LIBRARY
SUPREME COURT, U.S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1962

No. 63

BARBARA D. FORD, PETITIONER,

vs.

HERMAN A. FORD.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF SOUTH CAROLINA

PETITION FOR CERTIORARI FILED JANUARY 15, 1962
CERTIORARI GRANTED FEBRUARY 26, 1962

Office-Supreme Court, U.S.
FILED
JAN 15 1962
JOHN F. DAVIS, CLERK

No. 663

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
COURT OF COMMON PLEAS
HON. JOHN GRIMBALL, *Presiding Circuit Judge*

BARBARA D. FORD,

Plaintiff-Respondent,

Against

HERMAN A. FORD,

Defendant-Appellant

TRANSCRIPT OF RECORD

LEATHERWOOD, WALKER, TODD & MANN
Greenville, S. C.
DENNY, VALENTINE & DAVENPORT
Richmond, Va.
Attorneys for Appellant
CARTER & HILL
and
HAYNSWORTH, PERRY, BRYANT, MARION & JOHNSTONE
Greenville, S. C.
Attorneys for Respondent

INDEX

Statement 3
Complaint 6
Temporary Order 7
Answer 8
(a) Affidavit of John S. Davenport, III and attached correspondence 11
(b) Petition for Writ of Habeas Corpus 15
(c) Order Awarding Writ of Habeas Corpus 18
(d) Return on Writ of Habeas Corpus 19
(e) Motion to Quash the Writ of Habeas Corpus 20
(f) Order of Dismissal 20
Order of Juvenile & Domestic Relations Court Dated December 8, 1960 20
Order Circuit Court Dated December 13, 1960 28
Application For Appeal to the Court of Common Pleas 32
Narrative Statement of the Proceedings 40
Testimony
Mrs. Barbara D. Ford 65
Recalled 179
Mrs. Joan Gallivan 108
The Reverend T. A. Roberts 111
Aubrey Ford, III 114
Churchill Young 116
Dr. R. Finley Gayle, III 119
Mr. Herman Aubrey Ford 133
Mr. Henry Valentine 164
Mr. W. Langdon Trigg 168
Mrs. Elizabeth Long 172
Mrs. Cooper McIver 175
Order Circuit Court Dated February 25, 1961 185
Stipulation 191
Exceptions 191
Agreement 193

	Original	Print
Proceedings in the Supreme Court of the State of South Carolina	195	195
Opinion, Moss, J.	195	195
Dissenting opinion, Oxner, J.	200	207
Petition for rehearing	203	209
Order denying petition for rehearing	206	212
Notice of motion for stay of remittitur with order of court denying same (omitted in printing)	207	212
Clerk's certificate (omitted in printing)	208	212
Order allowing certiorari	209	213

STATEMENT

On August 10, 1960 the Respondent instituted this action in the Greenville County Juvenile and Domestic Relations Court seeking custody of the three (3) minor children of the Respondent and the Appellant by service of Summons and Complaint. At the time an ex parte 1
Order of the Juvenile and Domestic Relations Court denominated a "Temporary Order" was obtained by Respondent-Plaintiff without notice to Defendant-Appellant. This "Temporary Order" granted to Respondent-Plaintiff temporary custody of the three (3) children of the parties until the "action is heard upon its merits." The children were in Greenville, South Carolina with Respondent at the time of the commencement of this action in accordance with an agreement as to custody between the parties entered into in Richmond, Virginia, which agreement culminated in a consent dismissal of a habeas corpus proceeding brought by the Appellant-Defendant herein to acquire custody of the three (3) children. That agreement gave custody of the three (3) children to the husband-Appellant except for the summer 3
vacation from school and certain holiday season visits. In accordance with that agreement the Appellant had brought the children to Greenville from the family home in Sanford, North Carolina, and the children were thus with the mother in August of 1960. The service of the Summons and Complaint with the Temporary Restraining Order was made upon the Appellant father when he came to Greenville on a weekend to visit and to see his 4
children.

In due time the Appellant filed Answer to the Complaint and on September 2, 1960 the Judge of the Juvenile and Domestic Relations Court of Greenville County issued an Order dated September 2, 1960 providing for

the custody of the three (3) children to be with the Appellant father pursuant to the terms and provisions of the aforesaid agreement made in Richmond, Virginia by the parties. In addition to providing for return of the said children to the Appellant's residence in Sanford, North
5 Carolina, this Order provided that such custody would not defeat the jurisdiction of the Juvenile and Domestic Relations Court and upon adjudication of this matter by the Court, the Plaintiff and Defendant would deliver the minor children to the Court for custody as may be provided by final decree of the Court. The attorneys for both Plaintiff-Respondent and Defendant-Appellant consented to this Order.

6 The case proceeded to trial and on December 8, 1960 the Judge of the Greenville County Juvenile and Domestic Relations Court issued his Order awarding custody and control of the children to the Respondent. This Order was filed on Thursday, December 8, and directed the Defendant-Appellant to deliver the children to the Court on Monday, December 12, 1960 to be given over to the Plaintiff-Respondent. This Order further provided
7 that pursuant to the Consent Order above-mentioned and for the best interest of the minor children, no stay of custody shall be granted in the event of an appeal.

On December 10, 1960 the Defendant-Appellant moved in the Court of Common Pleas for Greenville County for an Order of Supersedeas to stay the Order of the Juvenile and Domestic Relations Court pending final determination of his appeal on the merits. By his
8 Order issued and filed December 13, 1960 Hon. J. Robert Martin, Jr., Resident Circuit Judge, granted Defendant-Appellant's motion and ordered that the custody agreement reached in the Richmond, Virginia habeas corpus proceeding be continued in force and effect until such

time as there was a final adjudication of the issues raised in the instant action.

On the same date, December 13, 1960 Plaintiff-Respondent's attorneys served Appellant-Defendant's attorneys with a notice of motion to be made in the Supreme 9
Court of South Carolina on December 15, 1960, for an Order dissolving and declaring null and void the Order issued by Circuit Judge, J. Robert Martin, Jr.

On December 14, 1960 the attorneys for Respondent served Appellant's attorneys with notice of intention to appeal to the Supreme Court of South Carolina from the Order of Circuit Judge, J. Robert Martin, Jr., dated De- 10
cember 13, 1960. The Supreme Court issued its Order on December 16, 1960 superseding the aforesaid Order of Judge Martin and declaring the same to be of none effect pending disposition of the appeal therefrom. That appeal has been perfected and at this date it is awaiting a hearing on oral arguments before the Supreme Court.

In due time the Appellant took proper exceptions and filed application for appeal to the Court of Common 11
Pleas for Greenville County from the aforesaid Order dated December 8, 1960 by the Judge of the Greenville County Juvenile and Domestic Relations Court. This appeal in accordance with the statutes provided came on for hearing at a special equity term of the Court of Common Pleas for Greenville County on January 9, 1961 before Hon. John Grimball, Presiding Judge. By his Order dated February 25, 1961 the Hon. John Grimball, Pre- 12
siding Circuit Judge, awarded the custody, care and control of the three (3) minor children jointly to the Respondent and the Appellant on terms prescribed in the Order. This Order provided for the Respondent to have the custody, care and control of the three (3) minor children during the normal school year commencing in Sep-

tember and ending in the early part of June of each year and for the Appellant to have the custody, care and control of said children during the normal summer holiday months and during the normal Christmas holidays of each school year. In so far as the Order of Judge Grimball differs from the Order of the Juvenile and Domestic Relations Court for Greenville County, the latter was overruled and amended and otherwise affirmed. Within due time the Appellant gave notice of appeal.

AMENDED COMPLAINT

The plaintiff by her amended complaint would respectfully show to the Court:

I

That the plaintiff is a resident of the County of Greenville, State of South Carolina; that the defendant is a resident of Sanford, N. C.

II

That the plaintiff and defendant were duly and legally married on March 16, 1952 in Richmond, Va.; that three (3) children, ages 7, 5 and 3, were born of this marital union.

III

That the children of this marriage are now residing with the plaintiff herein in Greenville County, State of South Carolina.

IV

That this plaintiff is informed and believes that for the benefit of the minor children of the parties that she is the proper person to have the control and custody of said children.

V

That the plaintiff is informed and believes that the defendant has been guilty of misconduct and is an unfit person to have custody of the minor children of the parties; that the plaintiff alleges that she is entitled to reasonable support for herself and for the minor children of the parties.

VI

That the plaintiff alleges that she is entitled to a temporary order of this Court granting her temporary custody of the minor children of the parties; that she is entitled to a temporary order from this Court for support for herself and the minor children of the parties.

WHEREFORE plaintiff prays judgment as follows:

(1) For a temporary and permanent order from this Court granting her custody of the minor children of the parties;

(2) For reasonable support for the plaintiff and the minor children of the parties;

(3) For such other and further relief as the Court may deem just and proper.

TEMPORARY ORDER

Upon reading the verified complaint herein, and upon motion of Carter & Hill, Attorneys,

IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff herein is hereby granted temporary custody of the minor

children of the parties until this action is heard upon its merits.

IT IS SO ORDERED.

J. WILBUR HICKS, *Judge*
Juvenile & Domestic Relations Court

August 5, 1960
Greenville, South Carolina

ANSWER

The Defendant, answering the Amended Complaint of the Plaintiff, respectfully shows to the Court:

I

The Defendant denies each and every allegation of the Complaint not hereinafter expressly admitted.

II

Paragraph I of the Complaint is admitted, the Plaintiff having moved to Greenville, South Carolina in January of 1960 and the Defendant having been a resident of Sanford, North Carolina since January of 1958. That Sanford, North Carolina where the Defendant now resides was the last residence of the Plaintiff and Defendant as husband and wife.

III

In answer to Paragraph II the Defendant alleges that Plaintiff and Defendant were duly and legally married on March 15, 1952 and three children of the ages set forth in the Amended Complaint were born of this marital union.

IV

In answer to Paragraph III the Defendant alleges that while the children of this marriage are now in Green-

ville County, South Carolina with the Plaintiff, that it is pursuant to an agreement duly and legally made between Plaintiff and Defendant by and with legal counsel and related to an action between this Defendant and this Plaintiff in the Law and Equity Court of the City 25
of Richmond, Virginia. That pursuant to said agreement the custody of the three children was agreed upon in writing by correspondence between respective legal counsel of the parties. According to said agreement the Plaintiff was to have custody of the children for the summer period beginning two weeks from the date the last child completes the school year and ending two days before the first child is to return to school in September and 26
except as otherwise specifically provided it was expressly agreed that the Defendant would have custody for the remainder of the year. As a part of his Answer the Defendant incorporates by reference the copies of the correspondence between legal counsel for the Plaintiff and legal counsel for the Defendant whereby an agreement was duly made between the parties with the knowledge 27
and permission of the said Law and Equity Court of the City of Richmond, Virginia and subsequent to which agreement the said action was dismissed. The Defendant alleges that he is entitled to the custody of the minor children according to the terms and provisions of said agreement between the parties. The defendant further attaches to this Answer an exemplified copy of all the proceedings in said Court including the Order of dismissal on the 18th day of November, 1959 and incorporates the same by reference. Further answering this Defendant alleges that Plaintiff has violated and breached the agreement made between the parties by and with their respective legal counsel and further violated the Order of the Court of record in Richmond, Virginia that was duly issued and based upon said agreement. 28

V

The Defendant expressly denies Paragraph IV of the Amended Complaint and on the contrary alleges
29 that the Plaintiff is not a fit or proper person to have control and custody of the said minor children. The Defendant alleges that the Plaintiff was guilty of gross misconduct during the time they resided as husband and wife and such gross misconduct included acts of adultery on numerous occasions during July and August, 1959 in Gloucester, Virginia, Chesterfield County, Virginia and a motel at Bowling Green, Virginia with a married man
30 who resides in Richmond, Virginia.

VI

The Defendant expressly denies Paragraph V of the Complaint and on the contrary alleges that the separation of the Plaintiff and Defendant from their marital life was the direct result and on account of the misconduct of the Plaintiff including the aforesaid acts of adultery.
31 That the acts and conduct of the Plaintiff were of a nature that rendered her unfit to have the custody of said children and were primary in the action instituted by Defendant against the Plaintiff in the said Law and Equity Court of the City of Richmond, Virginia.

VII

Paragraph VI of the Complaint is expressly denied
32 and Defendant denies that Plaintiff is entitled to any relief by this Court but on the contrary Defendant alleges that he is entitled to the custody of the said minor children; that Defendant maintains a permanent position at an ample salary that is sufficient to enable him to properly provide for the education, maintenance and support of his children; that he is able to provide a comfortable

and desirable home for his children and has been doing so where they reside in Sanford, North Carolina.

WHEREFORE, Defendant prays judgment that the Temporary Order of this Court be forthwith dissolved and the Amended Complaint of the Plaintiff be dismissed with prejudice; that the Defendant have legal custody of the minor children as provided in the agreement made and in force between the parties; that the Plaintiff be permanently restrained and enjoined from attempting to violate and breach said agreement; that the Plaintiff be declared an unfit and improper person to have custody of the minor children and for such other and further relief as the Court may deem just and proper.

STATE OF VIRGINIA
CITY OF RICHMOND

AFFIDAVIT

PERSONALLY appeared John S. Davenport, III, who being duly sworn, deposes and says:

That deponent is a member of the law firm of Denny, Valentine and Davenport in the City of Richmond, Virginia, and heretofore has represented H. Aubrey Ford, Jr., in an action against his wife, Barbara Dale Ford, instituted in the Law and Equity Court of the City of Richmond, Virginia. That said action was filed on or about August 28, 1959, and the said Barbara Dale Ford was represented by Alexander W. Parker of the law firm of Christian, Barton, Parker & Boyd of Richmond, Virginia. That negotiations were had between the parties and between deponent as counsel for the said H. Aubrey Ford, Jr., and the said Alexander W. Parker as counsel for Barbara Dale Ford and a settlement agreement was reached by the parties for custody of the minor children of the parties pursuant to which an Order of said Court was entered dismissing the action. That the agreement

between the parties was reduced to writing by their respective counsel and is represented by copies of correspondence attached to this Affidavit which deponent certifies to be true and correct copies, to-wit:

37 (1) Letter of deponent to Alexander W. Parker dated October 26, 1959,

(2) Letter of Alexander W. Parker to deponent dated October 27, 1959,

(3) Letter of deponent to Alexander W. Parker dated October 27, 1959.

JOHN S. DAVENPORT, III

38 SWORN TO Before me this the
16th day of August, 1960.
CLAUDETTE E. LIMBRICK (SEAL)
Notary Public for City of Richmond, Va.
My Commission expires February 17, 1964

"October 26, 1959

"Mr. Alexander W. Parker
"Attorney at Law
39 "Mutual Building
"Richmond, Virginia
"Dear Alex:

"Re: *H. Aubrey Ford, Jr. v. Barbara D. Ford*

"This letter concerns the subject of the conference held this morning in my office at which Aubrey and Barbara were present with you and me.

"As a proposal for settlement of the question of cus-
40 tody of the three Ford children, Aubrey has authorized me to convey the following:

"1. Barbara is to have the children for the summer period beginning two weeks from the date the last child completes the school year in June and ending two days before the first child is to return to school in September. Except as set forth below Aubrey is to have custody for the remainder of the year.

"2. During the time that Aubrey is on the Kentucky-Tennessee tobacco market between the latter part of November and the middle of December and in Europe in the spring, to the extent it does not interfere with school the children are to visit Barbara or Barbara to visit them in Sanford, whichever Aubrey and Barbara may agree to at the time. Aubrey tells me that there may be times when he will not be required to stay on the Kentucky-Tennessee market for more than two or three days at a time. I think it should be understood that in those cases this provision is not applicable. 41

"3. With reference to the Christmas vacation period Aubrey will agree that one of them shall have the children from the beginning of vacation until December 27 and the other for the balance of the vacation. These periods are to be reversed from year to year so that one parent will have the first part of vacation in one year and the latter part of vacation in the following year. He will further agree that an effort be made in each year to the extent possible under the circumstances that the family be in the same locality for the whole period. 42 43

"4. It is understood that when the children are with Barbara they are not to be in Richmond or Gloucester.

"5. Aubrey will, of course, provide for the children. When the children are with Barbara he will make a reasonable allowance to her for their maintenance and support but it is to be understood that she is not to incur any expenses or bills without Aubrey's prior approval. 44

"6. It is, of course, understood that when the children are with either parent the other is to have the right to visit at reasonable times.

"It is planned that little Aubrey will remain with Barbara until Christmas vacation so as not to interrupt his school in the meantime. After Barbara has established

herself wherever it may be, Aubrey will consider letting Jay be with Barbara most of the time until he is ready for school.

"If Barbara agrees to the above terms, it is desirable that this settlement be effective immediately so that Aubrey and the two youngest children can go to San-
45 ford with his mother as soon as possible. After you have had a chance to review this and discuss it with Barbara, I will appreciate a prompt reply.

"Sincerely yours,
"JOHN S. DAVENPORT, III"

"October 27, 1959

"John S. Davenport, III, Esq.
46 "Travelers Building
"Richmond 19, Virginia

"In re: *H. Aubrey Ford, Jr. v. Barbara D. Ford*
"Dear John:

"I have your letter of October 26th and have thoroughly discussed it and our conference with Barbara.

"Generally speaking we are in accord with all of the
47 contents of your letter.

"We do have a couple of suggestions:

"1. In paragraph 1 we would like to delete the words "in June" appearing on the third line.

"2. We would like for paragraph 4 to read as follows:

"It is understood that when the children are with Barbara they are not to be in Gloucester. Also that when the children are with Barbara they are not to live in
48 Richmond, but Barbara shall be privileged to bring the children to visit in Richmond provided that such visits shall not aggregate in time more than two weeks out of each year."

"As I understand from you on telephone these changes will be agreeable to you and Aubrey. If that be

true, then please let me know and we will consider this a matter accomplished.

"I assume, pursuant to the agreement that you and I had, that the suit in the Law and Equity Court will be dismissed promptly. 49

"Very sincerely yours,
ALEX W. PARKER"

"October 27, 1959

"Mr. Alexander W. Parker
"Christian, Barton, Parker & Boyd
"Mutual Building
"Richmond, Virginia 50
"Dear Alex:

"Re: *H. Aubrey Ford, Jr. v. Barbara D. Ford*

"I acknowledge your letter of this date in reply to mine of October 26.

"The two suggested changes which you set forth are agreeable to Aubrey and consequently, we may consider this as an accomplished matter.

"I will submit to you in the next few days an order 51 dismissing the case in the Law and Equity Court.

"Sincerely yours,
"JOHN S. DAVENPORT, III"

PETITION FOR WRIT OF HABEAS CORPUS

(Filed August 28, 1959)

TO THE HONORABLE JUDGES OF THE LAW & EQUITY COURT OF THE CITY OF RICHMOND 52

Your petitioner, H. Aubrey Ford, Jr., exhibits this his petition against Barbara Dale Ford, his wife, and respectfully represents as follows:

I

That he is the father and she is the mother of three children, namely, H. Aubrey Ford, III, six (6) years of

age; Barbara Gray Ford, four (4) years of age; and James Lowry Ford, two (2) years of age. Petitioner is a resident of the State of North Carolina and resides in Carbonton Heights in the City of Sanford in said State. He is employed by Tobacco Merchants Corporation of New York City and the Sanford Tobacco Company, Sanford, North Carolina.

II

Respondent has recently been guilty of acts which were not only of a nature that would justify petitioner seeking a divorce from her but which render her unfit to have the custody of said children. Knowledge of those acts first came to petitioner on August 15 when he was at home in Sanford, North Carolina, with the children above mentioned and his wife, the respondent, was visiting members of her family in Gloucester and in Richmond, Virginia. On the return of his wife to Sanford, North Carolina, in the middle of the following week conversations were had between petitioner and respondent concerning their future and the future of the children and in order that respondent might seek the advice of her mother and other members of her family, petitioner drove respondent to Richmond on Tuesday, August 25, leaving respondent at the home of respondent's mother in Richmond. Petitioner spent the night in Richmond at the home of his mother, having made arrangements for the children and their nurse to spend the night with friends of petitioner in Sanford, North Carolina.

III

Fearful lest respondent might clandestinely return to North Carolina, seize the children and take them, petitioner arranged on Wednesday, August 26, to have the

children taken from Sanford a distance of some 35 or 40 miles to Fayetteville, North Carolina, with their nurse. Petitioner together with his mother met the children and the nurse in Fayetteville on the night of Wednesday, August 26, they having been driven to Fayetteville by petitioners chauffeur. 57

IV

Petitioner, his mother, the three children and the nurse spent the night of August 26 at a motel in Fayetteville. The following morning petitioner left for his office in Sanford, leaving the children with his mother and their nurse. He had scarcely left the motel when respondent and her sister appeared in an automobile, took 58 the children over the protest of the nurse and petitioner's mother and left.

V

Petitioner believes that respondent with the children are now at the home of respondent's mother, Mrs. R. Finley Gayle, Jr., 311 Charmain Road, Richmond, Virginia. 59

VI

Petitioner alleges the positions as aforesaid which he occupies are permanent positions at ample salary and sufficient to enable him to properly provide for the education, maintenance and support of his children; that he is able to provide a comfortable home for his children and has been doing so where they reside in Sanford, North 60 Carolina, and that his mother, who is a widow, is ready and willing to make her home with petitioner to help him oversee and care for the children.

VII

Petitioner alleges that respondent is not a fit and proper person to have the custody of the said minor children and that petitioner is a fit and proper person to have such custody and that the best interests of said
61 children would be promoted by them being forthwith returned to the care, custody and control of petitioner.

WHEREFORE, petitioner prays that a writ of *habeas corpus ad subjiciendum* may issue directed to the said Barbara Dale Ford requiring her to produce the bodies of H. Aubrey Ford, III, Barbara Gray Ford and James Lowry Ford, before the court at a time and place therein specified and to do and receive what shall then and
62 there be considered by the court concerning said children, together with the cause of said detention, and that the petitioner have the care, custody and possession of said children.

H. AUBREY FORD, JR.
Petitioner

ORDER AWARDING WRIT OF HABEAS CORPUS

63 (Filed August 28, 1959)

This day came H. Aubrey Ford, Jr. by his attorney and presented to the Court his verified petition praying for a writ of *habeas corpus ad subjiciendum*, and it appearing therefrom that there is probable cause to believe that the infant children mentioned in said petition to-wit: H. Aubrey Ford, III, Barbara Gray Ford, James Lowry
64 Ford, are illegally detained and the custody of said infant children illegally held by respondent, Barbara Dale Ford, in the City of Richmond, Virginia, it is ordered that a writ of *habeas corpus ad subjiciendum* be, and the same is hereby ordered to be, issued out of the Clerk's office of this Court, directed the said Barbara

Dale Ford, commanding her to have and produce the bodies of the said infants as aforesaid, before the court on the 2nd day of September, 1959, at 10:30 A.M. in the forenoon on that day, to do and receive what is then and there been considered concerning the said infants and that she have then and there said writ of habeas corpus ad subjiciendum. 65

It is ordered that an attached copy of this order shall serve as the writ above mentioned.

RETURN ON WRIT OF HABEAS CORPUS
(Filed September 2, 1959)

Respondent, Barbara Dale Ford, for answer to the petition of H. Aubrey Ford, Jr., and the writ of habeas 66
corpus *ad subjiciendum* which was issued from the Clerk's Office of the Law and Equity Court of the City of Richmond on the 28th day of August, 1959, says that she now here produces the bodies of the said H. Aubrey Ford, III, Barbara Gray Ford and James Lowry Ford, the infant children named in the said petition for the writ, but by agreement of counsel the physical presence of said infant children not being required, and for further return 67
and answer to the said writ alleges and avers:

I

That the respondent is and always has been a fit and proper person to have custody of the said infant children.

II 68

That the said writ was issued improvidently and without probable cause.

And now having fully answered, respondent prays that the said writ may be discharged and that she may

be awarded her costs upon her return to the writ aforesaid in this behalf expended.

BARBARA DALE FORD

MOTION TO QUASH THE WRIT OF HABEAS CORPUS

69 (Filed September 2, 1959)

Respondent, Barbara Dale Ford, moves the Honorable Court to quash the writ of habeas corpus *ad subjiciendum* which was issued from the Clerk's Office of the Law and Equity Court of the City of Richmond on August 28, 1959, for the reason that the petition for the issuance of said writ is insufficient in that it fails to show
70 or allege probable cause that the infant children named therein, to-wit, H. Aubrey Ford, III, Barbara Gray Ford and James Lowry Ford, are detained without lawful authority.

BARBARA DALE FORD

ORDER OF DISMISSAL

(Filed November 18, 1959)

71 It being represented to the court by counsel that the parties hereto have agreed concerning the custody of the infant children, it is ordered that this case be dismissed.

Enter: J.H.R.
Nov. 18, 1959
Judge

ORDER JUVENILE & DOMESTIC RELATIONS COURT

73

This matter came before me on October 24th and 25th for a hearing on the merits. The plaintiff being represented by Rex. L. Carter, Esquire, of the firm of Car-

ter & Hill, and the defendant by Wesley M. Walker, Esquire, of the firm of Leatherwood, Walker, Todd & Mann, and John S. Davenport, III, Esquire, of the firm of Denny, Valentine and Davenport of Richmond, Va. The matter was argued by counsel before me the 5th day of December, 1960. 73

This action was commenced in this Court by a verified complaint by plaintiff which was duly and legally served as will be shown by affidavit of one J. H. Bradley, dated August 10, 1960; accompanying this complaint was a temporary order of this Court granting temporary custody of minor children to the plaintiff until the action was heard on its merits. The defendant in due time 74 answered. I find that the Court has jurisdiction of the parties hereto and the subject matter, that the parties and minor children hereto are properly before this Court.

On the 2nd day of September, 1960 by consent of the parties through counsel, the aforesaid temporary order was modified by order of this Court setting forth new provisions for custody pending the hearing on the merits. 75 This order also provided that the children being permitted to go with the father to Sanford, N. C. shall not defeat the jurisdiction of this Court, and that upon adjudication of this matter by this Court, the defendant shall deliver the minor children to this Court for custody as may be provided by the final decree of this Court.

The plaintiff by her complaint alleges that for the benefit of the minor children she is the proper person 76 to have control and custody; and that the defendant has been guilty of misconduct and is unfit to have custody; she also originally sought support for herself and the children but later by oral amendment withdrew her own claim.

The defendant in his answer plead a general denial; set forth an agreement previously reached by the parties; alleged plaintiff was not a fit and proper person to have custody by reason of adulterous conduct, which allegedly caused the separation of the parties; prayed, the complaint be dismissed with prejudice, plaintiff be declared
77 unfit and improper, he be granted custody as provided by the previous agreement; and she restrained from violating or breaching that agreement.

Upon the trial of this case the plaintiff on direct examination related having an affair of short duration with another, the facts of which she confessed to the defendant. This apparently precipitated the separation of
78 the parties although this separation did not come until some five days after the admission by the plaintiff. There is uncontradicted testimony from the plaintiff that the defendant had harassed and taunted her repeatedly over a period of years accusing her of frigidity. She testified this had caused her to seek counseling with a psychiatrist. Apparently out of this background came the affair. She testified she sought his forgiveness and attempted to
79 reconcile. None of her misconduct was in the presence of the children. This is, under all the testimony, the only evidence of misconduct by the plaintiff and nothing further is contended by the defendant.

On the other hand there is strong and believeable testimony, given candidly and innocently by little Aubrey Ford, III, age 7 1/2, the son of the parties showing that the defendant has not been exemplary in his conduct in
80 the child's presence. This child was carefully examined by this Court as to his competency as a witness and permitted to testify. His testimony clearly placed the defendant, his father, lying in the defendant's bed with the German maid. This misconduct raises serious ques-

tion about his suitability as a custodian of children of tender year. This Court, incidentally, could only consider with suspicion, the fact that the defendant, after discovering this child was to testify, sought to and did talk with him about his testimony. 81

There is no contradiction that the plaintiff has fully and well discharged her duty as a mother of her children. Furthermore, the Court takes cognizance of the good reputation enjoyed by the plaintiff in the communities where she and her husband have lived during their marriage and the good reputation she enjoys in Greenville where she has lived for almost a year. 82

The Court does not condone or seek to mitigate the acts of either party in this action but at the same time it must attempt to wisely decide this matter by but one yardstick and that is, what is best for the welfare of these minor children. The facts presented by the testimony and evidence, the demeanor of the witnesses, as observed by this Court are the only means by which this decision can be made. Three children are involved here. Their ages 83 are 3 years, 5 years and 7 years. To date neither parent has sought a divorce and so the custody and control of these minors is our only concern.

The Court finds neither acts of misconduct of the plaintiff or defendant justify a complete absence from the children, but that it is to the best interest of the children that the mother have custody and control. We are concerned here with children of tender years. They 84 face the world now with the need of the affection and care only their mother can bestow. Normally where there is a question of custody and control of children of this age the mother will be given consideration because of this very fact and the further fact of the basic differences in customary responsibilities of a mother and father. This

Court is not prepared to hold this misconduct by the plaintiff is enough, in and of itself alone, to deprive her of her children. But aside from that the misconduct of the defendant cannot be overlooked in determining custody between these parties and it is given major consideration.

85

> "Even though a father obtains a divorce, the preference of the mother as the custodian of a child of tender years persists where her fault does not reflect upon her *present fitness* to raise the child. Notwithstanding the misconduct of the mother, the welfare of the child may best be served by awarding it to her; and this welfare can be determined to some extent by
86 the comparative acts of the father and mother showing love and affection for it and a parental interest in its welfare.
>
> The fact that a mother is guilty of adultery does not necessarily disqualify her to have the custody of her children. Although she may have been a bad wife, she may be a good mother. 17 A *Am. Jur.* 820, page 16." (Emphasis added).

87 There has been not one iota of evidence in the case at hand reflecting on the present fitness of the mother and not one word implying subsequent misconduct. To the contrary, her subsequent conduct has been above reproach and not attacked.

Defense counsel relies upon *Powell v. Powell* 231 CS 283, 98 SE 2d 764 in argument, but there the special referee determined under the facts it would be to the
88 best interest of the child to award it to the father and there were numerous other factual considerations. Pointedly in the *Powell* case the Court did not forever bar the mother from the child for on page 287 the following is found: "Of course such adjudication is not final in the face of changed circumstances which may be made the

ground of future application to the Court for modification of the judgment. *Machado v. Machado* 220 SC 90, 66 SE 2d 629."

The defendant makes two basic claims: (1) that the plaintiff is an unfit and improper person to have custody; 89
and (2) that a prior agreement between the parties, reached through counsel at a time when an action was pending in the Law and Equity Court of the City of Richmond, Virginia, determined the question of custody. He also plead the plaintiff had violated an order of that Court. The proceedings there were attached to this answer and incorporated by reference. Furthermore, defendant's counsel argued the order of that Court was 90
res adjudica to certain issues before this Court, especially the question of the fitness of the plaintiff.

I find, however, the following:

(a) The aforementioned order was a mere order of dismissal it simply says: "It being represented to the Court by Counsel that the parties hereto have agreed concerning the custody of the infant children, it is or- 91
dered that the case be dismissed." This is the entire text of the order.

There were no findings of fact; no conclusions of law; no incorporation by reference of any written instrument or letter; and no dismissal with prejudice. It is therefore concluded, and I so find, that there was no intention by that Court to make that agreement a formal part of the decree. In fact there was an answer to the original 92
complaint denying the allegations of the petition; no hearing was held upon the merit; and defendant's counsel admitted this agreement itself was never shown to that Court.

(b) Even had there been a formal order of that Court, the question of custody of minor children is al-

ways open in that either party may petition again for a hearing; and upon a proper showing at that time, be it upon chnge of conditions of either spouse, or a change of condition concerning the children themselves, a new
93 determination may be had modifying the original order in conformance with the present day needs of the children. The question is always what is best for the welfare of the children? This is a continuing responsibility of the Court having proper jurisdiction. And that question is now before this Court.

(c) Looking at the agreement itself, as it is plead
94 in the defendant's answer in Paragraph IV, the following is found: ". . . plaintiff was to have custody for the summer period . . . etc.".

And later in the same paragraph ". . . defendant was to have custody for the remainder of this year."

The letter of defendant's attorneys dated October 26, 1959 which was addressed to plaintiff's attorney setting out this agreement between the parties reads as follows:
95 "After Barbara (the plaintiff in this action) has established herself, wherever that may be, Aubrey (the defendant in this action) will consider letting Jay (the youngest of the minor children) be with Barbara most of the time until he is ready for school."

By reason of the above it is obvious the agreement gave partial custody to the mother. The word "custody" was specifically used. The defendant at that time was also
96 contemplating giving her full custody of Jay until he became of school age.

If the plaintiff were so depraved as to be devoid of those necessary qualities of motherhood which nurture and comfort her children and rightful bind them each to the other in love and deep affection, so that she was to be considered an unfit and improper person and there-

by banded from their presence, it is inconceivable the defendant would have voluntarily forced them into her control. To the contrary his willingness to enter into the agreement clearly shows his own recognition and acknowledgement of her fitness, his own confidence that 97
she will generously provide proper care, and his own awareness of the vital needs of the children for the affection and guidance that no other may bestow.

In fact the testimony shows later he did in fact bring the youngest child to Greenville as he was contemplating, where he stayed in the custody and control of the plaintiff for a period of months.

All of these actions are inconsistent with his present contentions but affirm the fact that the plaintiff is a worthy, fit and proper person. 98

The defendant is of substantial means and from the facts it is apparent that the children are accustomed to a better than average living standard. To adequately meet their needs in accordance with that standard of living, I find the sum of One Hundred and no/100 99
($100.00) Dollars per week to be a reasonable amount for support of the children.

The Court suggests that the parties work out a provision for the defendant to have the children during a portion of their summer vacation and on holiday seasons, as well as certain other visitations. In the event this cannot be accomplished then the defendant may make further application to this Court. However, at this date the 100
plaintiff has been without her children. It is imperative that they be returned to the custody of the plaintiff immediately so that they may be enrolled in school and acclimated to Greenville during the coming holiday season.

NOW THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED as follows:

(1) That the plaintiff shall have, and she is hereby awarded, custody and control of the minor children of
101 the parties;

(2) That the defendant shall have reasonable visitation rights and these shall include some holidays and school vacation periods and are to be agreed upon by the parties;

(3) That a reasonable sum for support of the minor children is One Hundred and no/100 ($100.00) Dollars
102 per week, this to begin Saturday, December 17, 1960.

(4) That pursuant to the previous order of this Court, which was with consent of Counsel, and for the best interest of these minors the defendant shall deliver the children to this Court on Monday, December 12, 1960, at which time they will be given over to the plaintiff.

(5) That further pursuant to the consent order above
103 mentioned, and for the best interest of the minor children, it is ordered that if the defendant appeals from this order no stay of custody shall be granted and regardless of an appeal the defendant shall deliver the children to Greenville on the date mentioned above.

J. WILBUR HICKS, *Judge*
Greenville County Juvenile & Domestic Relations Court

104 December 8, 1960

ORDER CIRCUIT COURT

This action seeking custody of the three minor children of the parties was instituted in the Juvenile and Domestic Relations Court of Greenville County, South Carolina, in August 1960 by service of Summons and

Complaint. At the same time an ex parte Order of the Juvenile and Domestic Relations Court denominated a "temporary Order" was obtained by Plaintiff without notice to Defendant. This "temporary Order" grants to Plaintiff temporary custody of the three children of the 105
parties until the "action is heard upon its merits."

It appears that the children were in Greenville, South Carolina, with the Plaintiff at the time of the commencement of this action, in accordance with an agreement as to custody between the parties, entered into in Richmond, Virginia, which agreement culminated in a consent dismissal of a habeas corpus proceeding brought by the 106
Defendant herein to acquire custody of the three children. The same issue was involved in the Richmond, Virginia proceeding as is involved in this proceeding.

That agreement gave custody of the three children to the husband, the Defendant in this action, except for the summer vacation from school and certain holiday season visits. Commencing two weeks after the last child completes the school year and until two days before 107
school opens in the fall the wife, the Plaintiff herein, was to have the children. In accordance with that agreement the husband had brought the children to Greenville from his home in Sanford, North Carolina, and the children were thus with the mother in August of 1960. The agreement also provided for one parent to have the children from the beginning of the Christmas vacation until December 27th and the other parent to have the children 108
for the remainder of the Christmas holidays. The procedure was to be reversed from year to year. Pursuant to this agreement the mother had the children until December 27, 1959 and under such agreement the father would be entitled to the children for the Christmas holidays in 1960 until December 27th.

It further appears to the Court and Plaintiff's attorney so concedes, that the Plaintiff herein was represented by competent and able counsel in the Richmond, Virginia habeas corpus proceeding which was terminated by a consent Order upon the reaching of this agreement. The three children were at the time of the trial of
109 the case in the custody of the Defendant in Sanford, North Carolina, where the Defendant lives and where the home of the parties was prior to the separation. The two older children were and are in school at Sanford, North Carolina.

The Juvenile and Domestic Relations Court awarded custody to the Plaintiff with the Defendant to have reasonable visitation privileges and suggested an agreement
110 whereby the Defendant would have the children for a portion of the summer vacation period and for certain holiday seasons. It can be seen that this is exactly the opposite of the agreement reached by the parties under competent legal advice in Richmond, Virginia, which agreement resulted in consent dismissal of the habeas corpus proceeding brought there by the father.

111 The Order of the Juvenile and Domestic Relations Court further provided that the Defendant should deliver the children to the Court and thence to the Plaintiff on December 12, 1960, four days after the date of the Order. The Order further provided that "and for the best interest of the minor children, it is ordered that if the defendant appeals from this Order no stay of custody shall be granted and regardless of an appeal the de-
112 fendant shall deliver the children to Greenville on the date mentioned above."

There is no finding in the Order of the Juvenile and Domestic Relations Court which would justify such precipitate action nor anything to show such would be in

the best interest of the children involved. As a matter of fact, that Court finds "neither acts of misconduct of the Plaintiff or Defendant justify a complete absence from the children. X X X." The children are obviously well cared for by the father; else, the Juvenile and Domestic Relations Court would not have suggested an agreement between the parties so that the father could have the children for a portion of the summer vacation and holiday seasons. 113

If Defendant is successful in his appeal it would mean a falling back on the Richmond, Virginia agreement. It would mean the taking of the children back from the mother and restoring them to the father. It would mean that the children were snatched on four days' notice from their school and their home in Sanford, North Carolina, in the middle of the school year and brought to a new home and new school several hundred miles distant. A reversal of the Juvenile and Domestic Relations Court Order would mean repeating the process all over again. Such shuttling of small children is not in the opinion of this Court in the best interest of the children, especially where no other compelling reason for such action is shown or found by the Juvenile and Domestic Relations Court. It is to the best interest of the children here involved that the custody arrangements agreed upon in the Richmond, Virginia habeas corpus proceeding be continued in force and effect until a final adjudication of the issues here involved is had. Plaintiff's attorney concedes that this matter is discretionary with this Court. It is not contended by Plaintiff's attorney that grave and important legal issues are not raised by the appeal nor is it contended that the Defendant is not earnest in his appeal. 114 115 116

Now, THEREFORE, upon motion of Leatherwood,

Walker, Todd & Mann, Attorneys for the Defendant, and after hearing held before me Saturday, December 10, 1960, with both parties present and presenting their contention,

IT IS ORDERED, ADJUDGED AND DECREED that the custody agreement reached in the Richmond, Virginia habeas
117 corpus proceeding be continued in force and effect until such time as there is a final adjudication of the issues raised in the instant action.

AND IT IS SO ORDERED.

J. ROBERT MARTIN, JR.
Resident Judge
Thirteenth Judicial Circuit

418 December 13th 1960.

APPLICATION FOR APPEAL TO THE COURT OF COMMON PLEAS AND EXCEPTIONS OF DEFENDANT

TO CARTER & HILL, ATTORNEYS FOR PLAINTIFF, AND TO J. WILBER HICKS, JUDGE OF THE JUVENILE & DOMESTIC
119 RELATIONS COURT OF GREENVILLE COUNTY:

PLEASE TAKE NOTICE that the Defendant in the above entitled case herewith makes application to the Court of Common Pleas of Greenville County for an appeal in this cause and takes exception to the findings of fact and conclusions of law contained in the Order of the Judge of the Juvenile & Domestic Relations Court and respectfully asks the Court of Common Pleas of Greenville
120 County to reverse said Order upon the following grounds:

I

That the Judge of the Juvenile & Domestic Relations Court erred in awarding custody and control of the minor children of the parties to the Plaintiff.

(a) That such conclusion is contrary to the law and evidence in the case;

(b) There is no finding of fact upon which said conclusion was based which was supported by the evidence.

II

That the Plaintiff failed to prove that Defendant was an unfit person to have custody of said minor children.

(a) That Plaintiff's own witnesses testified that Defendant was a very fine person of the highest type and at all times had conducted himself as a gentleman; that Defendant was attentive to his children and they had a very high regard for Defendant;

(b) That the Judge of the Court stated on the record during presentation of Plaintiff's case:

> "Before going on to the next witness, both parties are good people, good family, good parents. I am going to exclude any further testimony as to their faithfulness as parents . . . They are good parents, love their children . . .";

(c) That during the presentation of the Defendant's case the Judge stated on the record:

> "Mr. Walker, I understand you are going to undertake to prove the fitness of the father of the children? They have not attacked it." (Transcript of Testimony Page 91)

Also, during presentation of Defendant's case the Court stated onto the record:

> "As to the fitness — practically a perfect record on both sides." (Transcript of Testimony Page 94)

(d) That the evidence showed that Defendant was

a fit and proper person to have custody of the minor children of the parties and the finding of the Judge in this respect was without basis and contrary to the evidence.

III

125 That the Plaintiff failed to prove that Defendant was guilty of misconduct.

(a) There was no testimony presented by the Plaintiff to show any misconduct on the part of the Defendant and the Judge erred in holding that the testimony of little Aubrey Ford, III, age seven and one-half, placed serious question about suitability of the Defendant as a
126 custodian of children of tender years;

(b) That the Judge erred in placing emphasis upon and making a totally unwarranted in plication from the testimony of the child;

(c) That the Judge erred in holding that he considered with suspicion the fact that the Defendant talked with his infant son about his coming to Greenville to testify when the child was residing with his father
127 at the family home in Sanford, North Carolina;

(1) There is no testimony or indication of any evidence that the Defendant attempted to influence the child in any respect.

(2) That the testimony clearly shows that the Plaintiff did exercise influence on the child by leading the child into discussion and transcribing his conversation.

(d) That the Judge erred in permitting a child of
128 such tender age to testify over the objection of Defendant's counsel;

(1) Erred in concluding unwarranted insinuations and implications from such testimony, and

(2) Erred in determining on the basis of such un-

sworn testimony of an infant child that the Defendant was guilty of misconduct.

IV

That the Plaintiff failed to show by the evidence that she is the proper person to have custody of the minor children in lieu of the Defendant. 129

(a) That the holding of the Judge that the Plaintiff was a proper person to have custody was without basis and contrary to the evidence;

(b) That the Judge erred in failing to consider and give weight to the evidence of adultery by the Plaintiff over an extended period with a married man and in lightly dismissing such admitted adulterous conduct as "an affair of a short duration with another"; 130

(c) That the Judge erred in concluding Defendant to have been guilty of grave misconduct far more serious than the extended and deliberate adulterous affair of the Plaintiff and in basing such conclusion about the Defendant solely upon the testimony of a seven year old child given in response to leading questions by the mother's counsel. 131

V

That the Judge erred in holding there is no contradiction that the Plaintiff has fully and well discharged her duty as a mother to her children when her testimony shows:

(a) That while on vacation with the three minor children at Gloucester, Virginia the Plaintiff indulged in 132 an adulterous affair with a married man;

(b) That while visiting in Richmond, Virginia with one of her children she left her child at the home of the child's grandmother and spent the greater portion of the

night in a trailer indulging in adultery with a married man;

(c) That the Plaintiff spent the night in a motel at Bowling Green, Virginia indulging in adultery with a married man;

133 (d) That the Judge erred in holding that conclusive evidence of sexual immorality by an admitted adulteress is not evidence of such party's unfitness to have custody of minor children.

VI

That the Judge erred in holding that in a controversy as to custody between the mother and the father
134 the mother will be given preferential consideration because of "the basic difference in customary responsibilities of a mother and father."

(a) The Judge erred in failing to give due consideration to Section 31-51 of the 1952 Code of Laws of South Carolina which puts the father and mother upon parity with respect to the legal right of custody of their children;

135 (b) That the Judge erred in holding, "there has been not one iota of evidence in the case at hand reflecting on the present fitness of the mother," when her own testimony shows that she is an admitted adulteress in a deliberate and extended affair;

(c) That the Judge erred in holding that *Powell v. Powell*, 231 S. C. 283, 98 S. E. 2d 764, would not apply in this case and further erred in holding there were
136 numerous other factual considerations in addition to adultery of the wife to cause the special referee to award custody of the child to the father; it being submitted that in *Powell v. Powell* our Supreme Court expressly held:

> "The welfare of the child is paramount and we cannot hold that it would be best assured

by confiding custody to Respondent whose life has been characterized by sexual immorality."

VII

That the Judge erred in failing to hold that the 137
agreement previously made between the parties through their respective counsel at a time when an action was pending in the Law and Equity Court of the City of Richmond, Virginia, determined the question of custody and was binding upon the parties.

(a) That Plaintiff admitted the making of such agreement and it was acknowledged that she was represented in such proceeding in Richmond by able and 138
competent counsel and further, that the agreed Order of dismissal of that Court was res adjudicata as to the issue of custody before this Court.

VIII

The Judge erred in failing to hold that the said agreement between the parties and the agreed Order 139
of dismissal was binding and res adjudicata.

(a) It is submitted that the Courts in South Carolina including the Juvenile & Domestic Relations Court of Greenville County must recognize in accordance with the Full Faith and Credit Clause of the Constitution of the United States such res adjudicata unless there was evidence of subsequent misconduct or a change of circumstances as to proper custody and control of the children; 140

(b) There was no evidence of any misconduct on the part of the Defendant subsequent to the making of the agreement between the parties for the custody of the children and no change in circumstances with respect to the custody of the children;

(c) There was no evidence of any misconduct on the part of the Defendant subsequent to the consent

Order of dismissal in the habeas corpus proceeding in the Virginia Court and no change in circumstances with respect to the custody of the children.

IX

That the Judge erred in holding it to be for the best
141 interest of the minor children for their custody to be awarded to the Plaintiff and in failing to make any findings of fact upon which such holding was based.

(a) Such a holding by the Court is not supported by the testimony and is contrary to the evidence and the law.

X

142 That the Judge erred in holding that the entering into the agreement in Richmond constituted a recognition and acknowledgment of the Plaintiff's fitness as a mother when such agreement gave custody and control to this Defendant except for summer vacation and certain holiday season visits.

(a) It being submitted that the agreement duly made
143 in Richmond which culminated in a consent dismissal of the said habeas corpus proceeding was lawful and binding upon the parties and it was proper for this Defendant to abide by and be bound under the terms of it.

XI

That the Judge erred in holding that the Plaintiff should have custody and control of the minor children
144 of the parties and that Defendant shall be required to support the minor children in the custody, care and control of the said Plaintiff.

(a) It being submitted that it is undisputed and apparently held by the Judge of the Juvenile and Domes-

tic Relations Court that the adulterous conduct of the Plaintiff precipitated the separation of the parties.

XII

That the Judge of the Juvenile and Domestic Relations Court erred in ordering and directing the Defendant to deliver the said minor children to said Court on Monday, December 12, 1960 when such Order was not issued and filed until December 8, 1960. 145

(a) It being submitted that the said minor children were with the Defendant at their home in Sanford, North Carolina, and any such action directed by the Court was hasty and precipitate and clearly not for the best interest of the minor children. 146

XIII

That the Judge of the Juvenile and Domestic Relations Court erred in ordering that if the Defendant appealed from such Order that no stay of custody could be granted, it being submitted: 147

(a) That any contention as to exclusive jurisdiction by the Juvenile and Domestic Relations Court of the custody of minors is in error and in conflict with Section 15-1104 of the 1952 Code of Laws of South Carolina, and

(b) That the Court of Common Pleas is a Court of general jurisdiction with no limitation upon its powers save as prohibited by the fundamental law, reference being made to Article 5, Section 15 of the Constitution of South Carolina for 1895; 148

(c) That such Order on the part of the Judge of the Juvenile and Domestic Relations Court violates the constitutional rights of the Defendant and constitutes an

attempt to prohibit an appeal in this cause by said Defendant.

DENNY, VALENTINE & DAVENPORT
LEATHERWOOD, WALKER, TODD & MANN
By: WESLEY M. WALKER
J. D. TODD, JR.

149 December 19, 1960

NARRATIVE STATEMENT OF THE PROCEEDINGS

I. PLEADINGS

This action was commenced in the Juvenile & Domestic Relations Court of Greenville County on August , 1960, by the filing of a verified complaint which was
150 duly served upon Defendant. Accompanying the complaint was a temporary order of such Juvenile & Domestic Relations Court which was entered on August , 1960, and which granted to Plaintiff the custody of the three minor children of Plaintiff and Defendant until the action was heard upon its merits. On September 2, 1960, another order was issued by such Court which granted to Defendant the custody of such minor children accord-
151 ing to the terms and provisions of a previous agreement for custody which had been made by the parties during previous litigation in the Law & Equity Court of the City of Richmond, Virginia. The subsequent order also provided that Defendant would deliver such minor children to the Juvenile & Domestic Relations Court of the County of Greenville for custody as may be provided by the final decree of such Court.

152 In her complaint, Plaintiff alleged that for the benefit of the minor children of the parties that she was the proper person to have custody and control of them. She also alleged that Defendant had been guilty of misconduct and that he was an unfit person to have such cus-

tody and control. Plaintiff originally requested support for both herself and the minor children, but such request for herself was later withdrawn by oral amendment (Tr. 2).

In his answer, Defendant pleaded a general denial 153
to the allegations of the complaint. In addition, Defendant alleged the previous agreement between the parties regarding the custody of such children. Defendant alleged that this agreement related to an action between the parties in the Law & Equity Court of the City of Richmond, Virginia, and that such agreement was reduced to writing by correspondence between counsel for the
parties dated October 26 and 27, 1959. A copy of such 154
correspondence and an exemplified copy of all proceedings in such Law & Equity Court, including an order of dismissal because of such agreement entered on November 18, 1959, were attached to the answer of Defendant in this case and were incorporated therein by reference.

In his answer, Defendant also alleged that Plaintiff 155
was not a fit or proper person to have custody and control of their minor children and that the separation of Defendant and Plaintiff was the result of misconduct by Plaintiff, including acts of adultery on numerous occasions during July and August, 1959, in Gloucester, Virginia, Chesterfield County, Virginia, and a motel at Bowling Green, Virginia, with a married man residing in Richmond, Virginia. Defendant prayed that the complaint be 156
dismissed with prejudice, that he be granted legal custody of the minor children as provided in the previous agreement between the parties, that Plaintiff be permanently restrained and enjoined from attempting to violate such agreement, and that Plaintiff be declared an unfit and improper person to have custody of such children.

The action came on for hearing in the Juvenile & Domestic Relations Court of Greenville County on October 24-25, 1960, and at that time both parties without objection submitted affidavits for consideration by the Court
157 (Tr. 1). The testimony was taken and transcribed by a court reporter and the transcript is filed herewith.

II. EVIDENCE

Barbara D. Ford (Plaintiff):

Plaintiff testified that she and Defendant were married on March 15, 1952, and that three children, two boys
158 and one girl, were born of the marriage whose ages were 7, 5, and 3. Plaintiff stated that she and Defendant were separated in September, 1959, and that their permanent residence was Sanford, North Carolina, at that time. The parties had previously lived together at twenty-six places during their marriage and while Defendant was engaged in his occupations of buyer on various tobacco markets. However, Sanford, North Carolina, had been the parties'
159 permanent home during the two years preceding their separation.

Plaintiff further testified that during her marriage, there had been difficulties arising out of their physical relationship with each other and that Defendant frequently mentioned these difficulties to her. After some discussion between the parties regarding consultation with a marriage counselor, Plaintiff consulted Dr. R. Fin-
160 ley Gayle, III, a psychiatrist, who was the step-brother and brother-in-law of Plaintiff. Following the consultation of Plaintiff with Dr. Gayle, Defendant also consulted him on two occasions. Plaintiff stated that her physical relationship with Defendant then improved on the surface but that Defendant continued to state that Plaintiff was frigid.

Plaintiff also testified that she vacationed in Glou-

cester, Virginia, during the Summer of 1959 in the company of her children and a German nurse who had been in her home in North Carolina for more than a year and one-half. During the first week of July in Gloucester, Plaintiff began having sexual relations with a married 161
man. These relations continued for a period in excess of six weeks, and they occurred on six occasions beginning with the first occasion in July. The relations in Gloucester took place outside the family cottage of Plaintiff and while the children were asleep in such cottage. Plaintiff testified that she told Defendant about her affair with the married man on August 19, approximately on the day that he returned to Sanford, North Carolina, from 162
Richmond, and that Defendant stated that he knew about the affair. Plaintiff and Defendant continued to live together in their home in Sanford for a period of five days following the disclosure of the affair, but they did not live together as man and wife. Following this five-day period, Plaintiff and Defendant drove to Richmond, and Defendant took Plaintiff to her mother's home in that 163
City. Plaintiff and her sister subsequently drove to Fayetteville, North Carolina, where the children were staying in a motel with Defendant, Defendant's mother, and the German nurse, and the children were taken by Plaintiff and her sister to Richmond, Virginia. The children remained in the custody of Plaintiff until Plaintiff and Defendant by counsel entered into an agreement regarding the custody of the children. 164

After entering into the agreement, Plaintiff moved to Greenville, South Carolina, where she lived in an apartment and worked at an advertising agency. In February, 1960, Defendant's mother brought the youngest child to Greenville, where such child remained until May.

Plaintiff testified that Defendant had not com-

plained about her conduct as a mother and that the German nurse was considered by Plaintiff and Defendant as a member of their family and was treated as such. Plaintiff stated, however, that on several occasions she
165 returned home to find the German nurse rubbing the back of Defendant while he was lying on the couch with his shirt removed. Plaintiff testified that this struck her as being unusual and that she did not like it. Plaintiff further testified that she felt that it would be in the best interest of the children for their custody to be awarded to her, because she was a good mother to them and be-
166 cause children need their mother. She stated that her affair with the married man did not reflect upon her ability as a mother and that she would support the children if their custody was awarded to her. She also stated that her husband's income was $19,500 in 1958, although he had informed her that such income was approximately $12,000. Plaintiff also testified that the sum of $350 a month, not including rent, would be necessary
167 to maintain the children in the style to which they were accustomed. Plaintiff testified that she attended the Episcopal Church in Sanford, North Carolina, and in Greenville, South Carolina, and that she sang in the choir of the Greenville Church.

On cross-examination, Plaintiff testified that the home in Sanford, North Carolina, was established in 1958 and that the parties moved into a new home in
168 Sanford a year later which cost approximately $17,000. Plaintiff also testified that Defendant worked hard and well at his job and that she only occasionally prepared breakfast for her husband and children while they were living in Sanford, and the German nurse was residing with them. She stated that although her husband was unable to go to Gloucester, Virginia, with her in the summer of 1959 because of his work, she went to Gloucester

knowing that Defendant had to go on the tobacco market shortly after Plaintiff returned to Sanford in August. Plaintiff stated that there was a lot of "partying" in the late afternoons in Gloucester which would extend until the early hours of the night. Her first relations with 169
Mr. Sloan, the married man from Richmond, took place on the weekend of July 4, 1959, the night of July 5. She was out with him very late while her mother, her sister, the German nurse, and a colored maid were with the children. She again had relations with Mr. Sloan during the two nights following July 5, and Mr. Sloan then returned to Richmond. The following weekend she again 170
had relations with Mr. Sloan. Plaintiff went to Richmond from Gloucester where she spent the night and then returned to Sanford. Around July 24, 1959, Plaintiff went back to Richmond to get her oldest child, leaving the two youngest children with the German nurse in Sanford. During her second night in Richmond, she attended a party which lasted until approximately midnight from which she departed in the company of the wife of a 171
friend and Mr. Sloan. After Mr. Sloan took the wife of the friend to her home, Plaintiff and Mr. Sloan went to a trailer which Mr. Sloan owned where Plaintiff had relations with Mr. Sloan and where they remained until 4:00 a.m. Later that morning, Plaintiff prepared coffee for Mr. Sloan at the home of a friend of hers and took it to him in the trailer. Plaintiff returned to Sanford on Sunday or Monday, July 26 or 27, 1959, following this weekend 172
in Richmond. Defendant returned to Sanford on the following weekend, and, over the objection of Defendant, Plaintiff again went to Gloucester, leaving the children with the German nurse in Sanford, although Plaintiff knew that defendant would be away from Sanford on business while Plaintiff was absent. After ten more days

in Gloucester, Plaintiff went to Richmond where she contacted Mr. Sloan. Defendant went with him to some place near Bowling Green, Virginia, they spent the night together, and they returned to Richmond the following day. During this period of approximately two weeks which
173 Plaintiff spent in Gloucester, Richmond, and near Bowling Green, she made no contact with Defendant, but she testified that she telephoned the children three or four times from Gloucester. While Plaintiff was having her affair with Mr. Sloan, she told several people about it, including her sister, her mother, a friend named Janice Young, the German nurse, and her step-brother, Dr. R. Finley Gayle, III. Four of these people were informed of
174 such affair within two weeks after it began.

Plaintiff testified that she did not want Defendant to know all the facts of her adultery over an extended period of time, and she did not think that he had a right to know of it. She stated that there was no reason why he should know. Plaintiff further testified that the agreement between her and Defendant, which was made by their counsel relating to the custody of the children of
175 the parties, was kept by Defendant in every sense of the word. All three of the children of the parties were in Greenville with Plaintiff from about June 20, 1960, until the institution of this suit in the Juvenile & Domestic Relations Court of the County of Greenville. Although there was no agreement between the parties for Defendant to support Plaintiff after their separation, Defendant paid Plaintiff's entire rent for a period of about three months.
176 Plaintiff admitted that she told Defendant following their discussion of her affair with Mr. Sloan, "You had to know Jim Sloan to like him." Plaintiff also admitted that this action had been instituted before and without any knowledge by Plaintiff of the death of her mother-in-law. In

fact, she also admitted that such death had nothing to do with the institution of such action. When Defendant came to Plaintiff's apartment in Greenville to inform his children of the death of their grandmother, the officer was waiting there to serve him with the amended com- 177
plaint in this case. Plaintiff had known of Defendant's visit to Greenville before his arrival.

MRS. JOAN GALLIVAN:

The witness testified that she was married to James Gallivan, had lived in Greenville for five years, and had known Plaintiff for three years. She further testified that she had seen Plaintiff on numerous occasions 178
with her children and that she was a good parent who had control over her children.

REVEREND T. A. ROBERTS:

The witness, who is the priest of the Episcopal Church in Greenville, South Carolina, testified that he had known Plaintiff since March, 1960, that she had been regular in her attendance at church, and that she sang in the 179
church choir. The witness also testified that Plaintiff consulted him about her marital problems sometime in that month.

H. AUBREY FORD, III:

The witness, who was seven years of age and is the oldest child of Plaintiff and Defendant, testified in answer to leading questions that he remembered a nurse 180
by the name of Dorothee who was in his home and that she was his good friend; that he had never seen the nurse kiss his father; and as follows:

"Q. Ever see her in your bedroom?

"A. It was my father's bedroom.

"Q. Whose was it?

"A. My daddy's.

"Q. What was she doing?
"A. Lying by him.
"Q. How was she dressed?
"A. Don't remember.
"Q. Have her clothes on or not; do you remember? You can't remember?
181 "A. No.
"Q. How was your father dressed?
"A. Don't remember.
"Q. See him kiss Dorothy?
"A. No.
"Q. Lying beside her?
"A. Yes.
182 "Q. On the bed?
"A. Yes."

On cross-examination, the witness stated that he did not remember how long his father and mother had been away from each other or how long it had been since the nurse, Dorothee, lived with the witness, although he thought he was six years of age at that time.

A. CHURCHILL YOUNG, III:

183 The witness testified that he had known Plaintiff at least fifteen years and that he had seen her frequently during her married life. He further testified that she was very attentive to her children and that an obvious mutual feeling between them existed.

On cross-examination, the witness stated that he had known Defendant since they were both seven or eight
184 years of age, that they had always been good friends, and that he had a very high regard for him. The witness further testified that Defendant at all times had conducted himself as a gentleman and that Defendant was attentive to his children.

"*By the Court*: Before going on to the next witness, both parties are good people, good family, good parents. I am going to exclude any further testimony as to their faithfulness as parents."

DR. R. FINLEY GAYLE, III:

The witness testified that Plaintiff was his step- 185
sister and his sister-in-law and that he had known Defendant since 1945 or 1946. The witness further testified that he had been consulted professionally in the early part of 1957 by Plaintiff and Defendant separately at Plaintiff's request. The witness stated that Defendant was a very industrious, meticulous person, whose meticulousness in all probability entered into the relationship 186
with his wife. In addition, the witness testified that the adultery of Plaintiff would not detract in any way from her being a good mother but that such adultery would lend support to her being a better mother. He testified that Plaintiff's experience had given her a greater security within herself regarding her potential as a woman.

On cross-examination, the witness stated that his consultation with Plaintiff in Richmond had occurred 187
prior to her affair, but the witness stated that he had talked to Plaintiff a little bit between August and October, 1959. The witness testified that he had talked with the attorney, who represented Plaintiff in the litigation in Richmond, prior to the agreement between the parties relating to the custody of their children and that the witness was sure that some of his testimony before the Juvenile & Domestic Relations Court of the County of 188
Greenville had been told in general terms to such attorney. The witness stated that he had been practicing psychiatry since 1953, although he had failed the psychiatric board examination on two occasions. He stated that he was preparing to take such examination for a third time. The

witness admitted that he was not able to completely dissociate himself from his relationship with Plaintiff and that he did not know whether he was ever able to be fully objective. The witness repeated his opinion that the affair of Plaintiff with Mr. Sloan over a period of six
189 weeks would result in making Plaintiff a better mother.

BARBARA D. FORD (Plaintiff) (Recalled):

On her recall to the stand, Plaintiff mentioned an incipient ulcer which she had in connection with previous testimony that in Sanford she occasionally went back to sleep in the morning after she had taken the children to school. Plaintiff testified that, as a result of what her child told her about Defendant's conduct, she made a
190 recording of such child's statement without the knowledge of such child.

On re-cross examination, Plaintiff testified that her child's statement to her about Defendant and the German nurse was made in October or early November, 1959, and on the day that such nurse left New York to return to Germany. Plaintiff stated that the nurse did
191 not leave until the agreement was made, and Plaintiff also stated that she had told the attorney, who represented her in the Richmond litigation, about her child's statement.

Plaintiff testified that she informed Defendant in December, 1959, of his son's statement to her and that Defendant said, "What could make a child say a thing like that?," and "Well, it isn't true." Plaintiff said that
192 she replied, "Well, you will have to deny it, and between you and little Aubrey, (I) would be more apt to believe little Aubrey." Plaintiff testified that she left Richmond on December 27, 1959, and that she did not know when the German nurse left for Germany except that she did

so immediately after the agreement between the parties regarding the custody of their children was signed.

H. AUBREY FORD, JR. (Defendant):

Defendant stated that he had been born and had grown up in Richmond, Virginia, and lived there from 1927 until 1950. He also stated that he and Plaintiff had 193
travelled the tobacco markets when they were first married in 1952. Their oldest child, H. Aubrey Ford, III, was born in June, 1953, their second child, Bonnie, was born in March, 1955, and their youngest child, James L., was born in March, 1957. Defendant stated that he and Plaintiff went to Germany in connection with his business in May 1957, and within six weeks to two months after 194
the birth of their youngest child. The parties returned from Germany in November, 1957, and in December of that year, or early January, 1958, they moved to Sanford, North Carolina. In June or July, 1959, or a little more than a month before the separation of the parties, Defendant purchased a lot in Sanford and planned to construct a house on it. Defendant testified that the house was almost completed at the time of his testimony. Referring 195
to the previous testimony of his son and the testimony of Plaintiff about his relationship with the German nurse, Defendant testified that Plaintiff said to him in a telephone conversation, "We have something on you about you and Dorothee." This statement of Plaintiff was made approximately ten days before the agreement was made between the parties regarding custody of their children. Defendant testified that he knew such statement of Plain- 196
tiff was made before the agreement, because she said in her conversation with him, "We have something on you; we know about you and Dorothee, but we won't use it in court." Defendant also testified that he asked Plaintiff on several subsequent occasions what she meant by her

statement and that she finally told him that their son had related to her the substance of their son's previous testimony. Defendant denied that he had ever laid with Dorothee on his bed, any other bed, or couch, and he testified that he so informed Plaintiff when she first told him what she was referring to in previous conversations about
197 Defendant and the German nurse.

Approximately after the agreement regarding custody of the children was reached, or about the middle of November, Defendant went to Sanford, North Carolina, with his two youngest children and his mother. The oldest child joined them in Sanford on December 27. He had been in school in Richmond during the Fall of 1959
198 and had been staying with Plaintiff at the home of Plaintiff's mother. On January 20, 1960, Defendant took the youngest child to Greenville to stay with Plaintiff, where he remained until nearly the end of May, 1960, with the exception of one week. The oldest child attended elementary school, and the next oldest child attended Mrs. Perry's kindergarten in Sanford during the school year 1959-1960. From January until May, 1960, Defend-
199 ant's mother lived in the house with Defendant and the two older children, and Defendant employed a servant to assist his mother. At the conclusion of the school year, Defendant took his mother and the two children to Myrtle Beach, South Carolina, for a vacation of approximately two weeks, or until June 16 or 17, 1960. After leaving Myrtle Beach, Defendant and the children returned to Sanford, and Defendant's mother returned to Richmond.
200 On June 20, 1960, Defendant's mother brought the two older children to Greenville, South Carolina, to stay with Plaintiff for the rest of the Summer or until the beginning of school in Sanford. During the school year, 1959-1960, Defendant took the two older children to Greenville for

extended weekends with Plaintiff. Defendant visited his three children in Greenville in the middle of July, 1960, and Defendant's mother died in Richmond on August 4, 1960. On August 9, 1960, Defendant informed Plaintiff by telephone that he was coming to Greenville to talk to 201
the children about the death of their grandmother on the following day. When Defendant arrived in Greenville on such day, August 10, he went to Plaintiff's apartment where he was served with the amended complaint in this case. Defendant testified that he did not know anything about a previous complaint being outstanding when he was served with the amended complaint. 202

Defendant testified that Mrs. J. K. Perry, who conducted the kindergarten attended by the Defendant's little girl, has been living in Defendant's home since the death of Defendant's mother. Mrs. Perry is 52 years of age and is a mother herself, and Defendant testified that the arrangement for Mrs. Perry to live with him and the children was a permanent one as far as he and Mrs. Perry were concerned. (Confirmed by Mrs. Perry's affi- 203
davit). Defendant also testified that he had a servant who was present in his home from 7:15 a.m. to 6:00 p.m. Defendant stated that Mrs. Perry adored his children and that his children adored her. Defendant also stated that it was possible for him to remain in Sanford all the time and that there would be little time that he would be away from home.

Defendant testified that Plaintiff had said twice to 204
him, with reference to Mr. Sloan with whom she had the affair, "To know him is to love him."

On cross-examination, Defendant confirmed the allegation in his answer that Plaintiff was an unfit mother. Defendant also testified that he first heard directly of Plaintiff's affair with Mr. Sloan from the German nurse,

Dorothee, and he testified that Plaintiff admitted such affair when confronted by him with it upon her return from Gloucester. Defendant denied telling Plaintiff in Richmond that he was going to seek a divorce and obtain custody of the children, but he admitted that he stated to Plaintiff that he was going to try to obtain such cus-
205 tody. Defendant testified that he made arrangements for the children to be moved with a friend and the German nurse to a motel in Fayetteville, North Carolina, after a discussion with Plaintiff's mother; he did not discuss such arrangement with Plaintiff. Defendant stated that Plaintiff's mother intimated to him that Plaintiff had gone after the children and that he made the arrangements
206 after hearing this. Defendant stated that the German nurse had been in the United States since April, 1958, and that she was approximately 22 or 23 years of age. Defendant said that Plaintiff had come home on one occasion and found the German nurse rubbing his back, but he testified that the German nurse had rubbed his back on other occasions when Plaintiff was in the house. Defendant denied that he and Plaintiff had discussed
207 these incidents, and he testified that he had asked Plaintiff to rub his back and that Plaintiff said, "Let Dorothee do it."

Defendant testified that he was concerned when Plaintiff told him about his son's statement to her and that he had discussed such statement with his son about a week before the trial. Defendant also testified that the only way that he knew his son would make such a remark
208 was for his son to be pushed and argued into it. In addition, Defendant stated that he had not spent a night away from Sanford since his trip to Georgia.

Defendant testified that his income is $12,000 in salary from Tobacco Merchants Corporation and $5,300

from Sanford Tobacco Company. He also testified that he received a good bonus from Tobacco Merchants Corporation in the preceding two years. In 1959, the bonus was $10,000, but Defendant stated that he was afraid that there would be no bonus in 1960. Defendant estimated 209
that he received dividends of $400 or $500 in 1959. He testified that he had been at home practically every night since he had returned to Sanford in December, 1959, and that he had made the arrangement with Mrs. Perry to take care of the children and to live in his home on the same day that he brought the two oldest children back from Greenville in September, 1960.

On re-direct examination, Defendant confirmed his 210
previous testimony that his son's testimony about him and the German nurse was not true, and he stated that he thought it was terrible that his son had been put through such a strain. Defendant stated that his gross income in 1957 was less than $12,000 and that his gross income in 1958 was just over $19,000. He stated that his 1958 salary included his bonus and that his income in 1958 included 211
a salary of $12,000 from Tobacco Merchants Corporation, a salary of $2,000 from Sanford Tobacco Company, and a bonus of about $7,500. He also stated that his tax returns for the taxable year 1957 showed just less than $12,000 as his gross income.

HENRY L. VALENTINE, II

The witness stated that he was born and had lived 212
in Richmond, Virginia, all his life. He also stated that he had known Defendant since the witness was around six or seven years of age and that he had known Plaintiff since the middle or early 1940's. The witness testified that he had been a member of the wedding party when Plaintiff and Defendant were married in 1952 and that he was an intimate friend of Defendant. The witness

was engaged in the brokerage of stocks and bonds, was married, and had two children. The witness testified that the general reputation for truth and veracity of Defendant was the very highest among the Defendant's contemporaries, as well as older and younger people. He also testified that he did not know of any situation in which
213 Defendant would not tell the truth.

> "The Court then directed that it be stated on the record that stipulations have been made with respect to fitness of both parents; Stipulated by both sides, and the court took notice, that they are both good parents, take good care of the children, except in the two areas mentioned, one with respect to the mother, and
214 one with respect to alleged conduct on the part of the father."

On cross-examination, the witness testified that Plaintiff had a fine reputation for truth and veracity in the community and that to witness' knowledge, there was no conceivable situation in which Plaintiff would not tell the truth.

215 LANDON W. TRIGG:

The witness stated that he had lived in Richmond all his life and that he met Defendant in 1939 when they were attending St. Christopher's School in that City. Since 1939, the witness and Defendant had been very close friends. The witness is married and has two children. The witness also stated that he had known Plaintiff since 1944 or 1945, and had visited in the home in Sanford.

216 The witness testified that he knew the reputation of Defendant for truth and veracity and that such reputation was excellent. The witness also testified that he did not believe that there would be a circumstance under which Defendant would not tell the truth.

On cross-examination, the witness testified that he

knew the reputation of Plaintiff for truth and veracity in the community and that such reputation was fine. The witness also testified that he could not conceive of any situation under which he believed that Plaintiff would tell a lie. 217

> "*By Mr. Walker*: ***I would state this on the record, we had intended to examine this witness with regard to observation and so forth in the home in Sanford in January of this year, and I did not go into that because I understood that your Honor had made certain stipulations.

The Court: As to the fitness, practically, a perfect record on both sides. 218

GEORGE PALMER:

The witness stated that he had known Defendant since February, 1958, in business and that he knew Defendant very well. He testified that he had been on the tobacco markets with Defendant, and that Defendant conducted himself as a gentleman at all times. The witness also testified that he knew the reputation of Defendant for truth and veracity in and around Sanford, North Carolina, and that Defendant would tell the truth under any circumstances. The witness stated that he was a supervisor with Tobacco Merchants Corporation, the same company with which Defendant was associated, and that he was familiar with the responsibilities of Defendant to that company. He stated that Defendant would stay in Sanford, North Carolina, and that the witness and Mr. Joyce would travel for the company. 219 220

On cross-examination, the witness stated that Defendant was overseer of purchasing for Tobacco Merchants Corporation and Defendant was his superior in that company. The witness testified that he had known Plaintiff since 1958, and that he had not heard any bad things regarding the reputation of Plaintiff.

MRS. ELIZABETH LONG:

The witness stated that she had lived in Sanford, North Carolina, for three-and-one-half years, and that her husband had died in 1958. The witness also stated that
221 she had been very well acquainted with Defendant since 1950 through Defendant's connection with the same business as the witness' husband, Tobacco Merchants Corporation, in Kinston, North Carolina.

The witness testified that Defendant and his family moved to Sanford, North Carolina, where the witness was living, in November, 1957. The witness stated that
222 she had not known Plaintiff before that time.

The witness testified that she was well-acquainted with the children of the parties and that she was familiar with the circumstances and maintenance of Plaintiff's home in Sanford since September 1, 1960. The witness also testified that Defendant had Mrs. Perry, who was a very nice person, with his children. Mrs. Perry, and the witness attend the same church, and the witness testi-
223 fied that Mrs. Perry had reared two fine children, conducted a kindergarten in Sanford, and was good with and making happy the children of Defendant. The witness stated that she had visited in the home of Defendant many times since September 1, 1960, and that she and Defendant were members of St. Thomas Episcopal Church. The witness testified that Defendant goes with his children to Sunday School at that church.

224 The witness also testified that she knew the reputation of Defendant for truth and veracity, that Defendant would tell the truth under any circumstances, and that Defendant was an excellent character.

On cross-examination, the witness stated that Mrs. Perry, who cared for the children of Defendant, continued to conduct her kindergarten in her home. The

witness testified that she had observed Plaintiff taking her children to Sunday School in Sanford prior to September, 1960, and that Plaintiff sang in the choir. The witness also testified that she knew Plaintiff's reputation for truth and veracity and that, as far as the witness knew, it was all right.

MRS. COOPER MCIVER:

The witness stated that she had lived in Sanford, North Carolina, since she was sixteen years of age, that she was a mother, and that her husband was the publisher of the Sanford newspaper. She also stated that she was acquainted with both Plaintiff and Defendant and that she considered herself a good friend of Plaintiff.

The witness testified that she and her two daughters had visited Plaintiff in Greenville on a day which she thought was Tuesday, August 9, 1960. On arriving in Greenville in the afternoon, the witness and her children went to Plaintiff's apartment where they found Plaintiff, Plaintiff's mother, and Plaintiff's children. During the visit, the witness said to Plaintiff, "Barbara, isn't there any chance of you and Aubrey going back together?". Plaintiff replied, "No, Cooper, it is completely out. I t'ink it would be the worst thing that could happen for the children's sake." The witness testified that Plaintiff said, when asked by witness if she still loved Defendant, "No, all I have for Aubrey is pity." Plaintiff explained that the reason for her pity was that Defendant was unsure of himself, and Plaintiff stated that she dreaded the trips of Defendant to Greenville to see his children.

The witness testified that she telephoned Plaintiff from Brevard on the day of her visit with Plaintiff in Greenville and that Plaintiff then stated that Defendant was coming to Greenville. The witness didn't remember whether or not Plaintiff knew the day on which Defend-

ant was coming. The witness testified that Plaintiff, during the witness' visit with her in Greenville, spoke of the death of Defendant's mother, and, when asked what would happen to the children in view of such death,
229 Plaintiff stated that she hoped to get them although she didn't say how she planned to do so.

On cross-examination, the witness stated that Plaintiff dreaded the Defendant's coming to visit the children because they had nothing to say to each other and that there was no conversation between them that was pleasant.

230 BARBARA D. FORD (Plaintiff) (Recalled):

On her recall to the stand, Plaintiff confirmed the testimony of Mrs. Cooper McIver, who had testified that Plaintiff had stated to her that it was impossible for Plaintiff and Defendant to have a reconciliation. Plaintiff also confirmed Mrs. McIver's testimony that Plaintiff had stated that she dreaded to see Defendant come to Greenville, but Plaintiff stated that she could not remem-
231 ber explaining to Mrs. McIver the reason for such dread.

Plaintiff also confirmed Defendant's testimony that Plaintiff had called him and mentioned something about his relationship with Dorothee, the German nurse, prior to the agreement between Plaintiff and Defendant regarding custody. Plaintiff testified that she told Defendant that there must be something between Dorothee and
232 Defendant or Dorothee would not have told Defendant these things and would not be on his (Defendant's) side. Plaintiff testified that she did not know any of her oldest son's testimony at the time she called Defendant and that she did not know of such testimony prior to the agreement regarding custody. Plaintiff repeated her testimony that she learned of her son's testimony for the first time on the day that Dorothee went to New York to sail for

Europe, and Plaintiff testified that she had entered into the agreement with Defendant at that time. She stated that she remembered thinking how ironic it was that her son's testimony did not come out until the agreement was made, and she also stated that she knew that Dorothee was not in New York because "We" called the hotel in which Defendant's company always houses their foreign people that stay in New York and that Dorothee was not registered. Plaintiff testified that she would not have signed the agreement if she had known of her son's statement.

On cross-examination after her recall to the stand, Plaintiff stated that she considered Dorothee as a very close friend, and Plaintiff confirmed her testimony that she confided in Dorothee with regard to her (Plaintiff's) own affair. Plaintiff admitted that she mentioned or contended to Defendant something about his relationship with Dorothee either by telephone or in person prior to the agreement between Plaintiff and Defendant regarding custody. Plaintiff testified that she had no suspicion regarding Defendant and Dorothee until Plaintiff was in Richmond after her separation and when she was represented by counsel in making an agreement. She had no suspicion during the entire time that she and Defendant were living together as husband and wife and Dorothee was living in their home. Plaintiff also testified that she did not realize that it was Dorothee who had told Defendant about Plaintiff's affair until she got to Richmond and "saw that must be it." Plaintiff again testified that the first time that she had any suspicion was in September when she was represented by counsel and was working toward the making of the agreement, and, at this time, Defendant, Dorothee, and many others knew about Plaintiff's affair with Mr. Sloan. Plaintiff stated that she

did not mention her suspicion to anyone but Defendant during the negotiations leading to the agreement regarding custody and that she said to Defendant, "If you have been doing this thing, if your hands are not clean, why are you doing this to me?".

237 Plaintiff testified that she made a record on December 22, 1959, and after the statement which her son had made to her. This record was made in the house of Plaintiff's mother and in the room of Plaintiff's son in such house. Plaintiff testified that she was not in Greenville, South Carolina, between the time of her separation from Defendant in August, 1959, and January 10, 1960.

238 Certified with proposed amendments and additions attached, plus original records.

J. WILBUR HICKS, *Judge*

1/3/61

EXCEPTIONS AND/OR AMENDMENTS TO THE NARRATIVE STATEMENT OF THE APPELLANT

EXCEPTION I

239 The plaintiff-respondent amends the narrative statement by striking out the entire narrative statement and substituting in lieu thereof the typewritten transcript of the proceedings.

EXCEPTION II

240 The plaintiff-respondent amends the narrative statement beginning on Page 2 at the end of line 31 by adding the following; "the plaintiff testified the children were asleep in the cottage with her sister, her mother, Dorothy (the German maid) and a colored maid." (Tr. 20)

EXCEPTION III

The plaintiff-respondent amends the narrative statement beginning on Page 5, line 25 by adding the following: "the plaintiff testified during the weekends when 241
the husbands came down there was a good deal of partying but during the week practically none." (Tr. 20)

EXCEPTION IV

The plaintiff-respondent amends the narrative statement beginning on line 16, Page 6 by adding the following: "Question. And although he had objected you left for Gloucester by yourself before he returned from the 242
Georgia market? Answer. Left the same day; we never discussed it." (Tr. 24).

EXCEPTION V

The plaintiff-respondent amends the narrative statement on Page 7 beginning on line 4 by adding the following: "The plaintiff-respondent testified that she did not think it was to his advantage to know all the details 243
she further testified in answer to the direct question from Mr. Walker, attorney for the appellant, "that he had no right to know," she answered that "it would not help him, I have sinned and I am sorry." (Tr. 29)

EXCEPTION VI

The plaintiff-respondent amends page 7 of the narrative statement by adding to the testimony of Mrs. Joan 244
Gallivan the following: "She testified that she had seen the plaintiff with her children on numerous occasions and had seen her at Church every Sunday; that she was very affectionate towards the children and that the children were towards her; that she also made clothes for them and kept a neat and tidy apartment" (Tr. 40)

EXCEPTION VII

The plaintiff-respondent amends Page 8 by adding to Dr. Roberts testimony the following: Rev. Roberts testified that he knew the plaintiff-respondent brought the children to Sunday School. (Tr. 42).

245

EXCEPTION VIII

The plaintiff-respondent amends the narrative statement on Page 8, line 2 by adding the following: "That there was no exceptions made as to the manner in which the questions were asked." (Tr. 45 and 46)

EXCEPTION IX

246 The plaintiff-respondent amends Page 10, line 15 of the narrative statement by pointing out that Mr. Walker, Attorney for the appellant, admitted that Dr. Gayle was a qualified psychiatrist. (Tr. 51)

EXCEPTION X

The plaintiff-respondent amends Page 10, line 23 of the narrative statement by adding the following: "Q. In
247 view of the testimony that she committed adultery in 1959 with one man over six weeks, coupling that with your professional knowledge and observation of Mrs. Ford and the children, do you have an opinion as to what bearing the summer of 1959 would have on her relations with the children? Mr. Walker: We object, Your Honor. The function of an expert witness is not to decide on what a judge should decide — when it reaches a con-
248 clusion, that is going too far. The Court: The Supreme Court has pushed the door a little ajar on that issue. Let him testify as to whether or not this episode affects the moral fibre of the situation in such a way as to make a change that would be injurious for the children. A. My

feeling is that it would not detract in any way from her being a good mother; it will lend support to her being a better mother. This young woman has had a very meaningful, although disastrous, experience, I think. And this has given her something which she has regretted from the very moment it happened, but nevertheless it has given her a greater security within herself as to what her potential is as a woman. It is behind her, past her, could make her a better mother." (Tr. 55). 249

EXCEPTION XI

The plaintiff-respondent amends Page 14, line 30 of the narrative statement by striking out line 30 and inserting in lieu thereof the following question and answer on cross examination of the defendant: "Q. You heard your wife testify, and it is true that your wife came home on several occasions and discovered the maid rubbing your back, with your shirt off? A. May I answer it fully? The Court: If it is responsive. A. That is true, but there were other times too. 250

EXCEPTION XII

The plaintiff-respondent amends Page 19, by adding to Mrs. Cooper McIver's testimony the following question and answer on cross examination: "Q. Was it not substantially that it looked like a reconciliation was impossible? A. Yes." (Tr. 102) 251

TESTIMONY

MRS. BARBARA D. FORD, having been duly sworn, testified: 252

Direct Examination By Mr. Carter:

Q. Mrs. Ford, when were you and Herman A. Ford married?

A. March 15, 1952.

By the Court: Those things are not denied. If you

wish to make a statement that this witness does so forth and so on, the affidavits will support it.

Q. You have three children by this marriage?

A. Yes.

Q. Their ages are three, five and seven?

253 A. That is right.

Q. Two boys and one girl?

A. Correct.

Q. Now, Barbara, on or about January 1 of this year, you and your husband were separated? Correct?

A. We were separated in September of 1959.

Q. Where were you living at that time?

A. Sanford, North Carolina.

254 Q. Prior to that time, where were you living?

A. Various places.

Q. Mention a few.

A. Twenty-six homes in various tobacco markets — one in Maryland, in Tennessee, various places.

Q. You say that there were twenty-six different places you and your husband lived during your married life?

255 A. Yes, an average of three months each.

Q. Your husband is engaged in the tobacco business?

A. Right.

Q. In what capacity?

A. He has been a buyer, recently became a tobacco supervisor, circuit rider, most of the time was a buyer.

256 Q. Did his duties make it necessary for him to travel extensively?

A. Yes, sir.

Q. How often was he away from the home?

A. When I was with him, he wasn't away much because we took the home with us.

Q. During the last two years, when you lived at Sanford, was that your permanent home?

A. Yes.

Q. Was he away much of the time?

A. Yes, quite frequently.

Q. How often?

257 A. During the market season he was in Kentucky when the Kentucky season was on, and in various parts of lower North Carolina.

Q. Weekly or monthly?

A. Depending on the season; went to Europe for two to six weeks, (it varied) during the year.

Q. Prior to the time you were separated, did you and your husband have any difficulties of any nature?

258 A. Difficulties of almost every nature.

Q. When did these difficulties begin?

A. I would say a number of them began three months after we were married.

Q. What type of difficulties were they?

A. The physical relationship for one, then there was money and the children.

Q. What about the physical relationship?

259 A. Well, he said quite often, and implied when he didn't say it, that I was frigid, that I wasn't fulfilling my obligation as a wife because, I wasn't satisfying him, I guess, or I wasn't getting anything out of the relationship.

Q. Had you ever told him that you were not getting anything out of your relationship?

A. Never told him, but suppose it was pretty obvious.

260 Q. How often did he mention this to you?

A. Once every two weeks, and later once a week.

Q. As a result of this discussion did you have occasion to consult a psychiatrist in 1957?

A. Wanted to see a marriage counselor and spoke about that repeatedly, but he said there was nothing wrong with our relationship that we could not discuss between ourselves, and that he did not want it talked outside; did not consent to go to a marriage counselor. And I asked him if I could go to see Fin who is a psy-
261 chiatrist – my brother.

Q. Your real brother?

A. My step-brother. He said I could see him if I wanted to, but he would not.

Q. Did you go to consult with Dr. Gayle?

A. Yes, on several occasions.

Q. As a result of your discussion with Dr. Gayle, do
262 you know of your own knowledge whether your husband saw him?

A. Yes, it was the time of Tennessee market, he was away from home, and I told him I had talked with Finley, and he said he could not help us if Aubrey would not talk to him, and he did go on two occasions.

Q. Did he make any recommendations?

A. He said –

263 Objection by Mr. Walker as to what the psychiatrist said.

Q. Answer "Yes," or "No."

A. Yes.

Q. He did make a recommendation?

A. Yes.

Q. Attempt to follow his recommendations?

A. Yes.

264

By the Court: Make them in writing?

A. No.

By Mr. Carter: Did your relationship with your husband improve?

A. On the surface, yes, as far as the physical relationship was concerned.

Q. Did he continue to question whether or not you were being a wife to him?

A. Yes, he did; still called me frigid, said that – 265

Q. He continued to accuse you of being frigid or to say that you were frigid?

A. Yes.

Q. How often were you having sexual relations with your husband at that time?

A. About every other night.

Q. In 1959, up until that time, had your husband 266 ever complained about whether you were making a good mother to the children?

A. No.

Q. Ever indicate to you that he did not think you were making a good mother?

A. No, never.

Q. Now, in 1959, I believe you had occasion to visit Gloucester – is that in Virginia or North Carolina? 267

A. Virginia.

Q. You visited Gloucester?

A. Correct.

Q. Went on a vacation?

A. Correct.

Q. With the children?

A. The children and a nurse.

Q. Where did she come from? 268

A. From Lubeck, Germany. She came over after we came back.

Q. How long had she been in your home, prior to your visit to Gloucester?

A. In North Carolina, for a year and a half, something over – fifteen months, in Germany with us three months.

By the Court: The time, the total time, how long?

A. A little over a year and a half.

By Mr. Carter: How old is she?

A. Twenty-two now.

Q. When you visited in Gloucester did you have an
269 affair with a married man on different occasions?

A. I did.

Q. When did you have the first sexual relation with him?

A. During the first week in July.

Q. Did that relationship continue?

A. Yes, it did.

Q. For how long?

270 A. Over a period of six weeks.

Q. Following the first act in July, how many times did you have sexual relations with him during this period?

A. Six.

Q. Where were the children when you were going out with him?

A. Asleep at home, with my sister and my maid.

Q. Who put the children to bed?

271 A. I did.

Q. You always had your mother or the maid with them?

A. Yes.

By The Court: Were these occasions at home?

A. No, sir, at Gloucester.

272 *By Mr. Carter*: When you had the first date with this man, where were you staying?

A. In the family cottage, at Gloucester Banks, Virginia, with my sister.

The Court: You and this man go elsewhere?

A. Yes, sir.

By Mr. Carter: Where did you go, Barbara?
A. Out in the car.
Q. On this first occasion, you went out in the car?
A. Yes, sir.
Q. And the children were in bed asleep? 273
A. Yes, sir.

The Court: Was this outside of the home?
A. Yes, sir, every time.

By Mr. Carter: Did you have occasion to tell your husband about this affair?
A. Yes, sir.
Q. When did you tell him? 274
A. I told him about it the 19th of August.
Q. The 19th of August?
A. About the 19th.
Q. And what was his reaction at that time?
A. Well, he already knew all about it — he was not surprised.
Q. I believe you told him on the day he came back from Richmond, or Gloucester — you told him about it? 275
A. From Richmond.
Q. What did he ask you, if anything?
A. Asked me if I thought we could still make a go of our marriage.
Q. What did he ask you about the affair?
A. He said, "I know all about it."
Q. What did you tell him? 276
A. I said, "It is true, Aubrey."
Q. Did you continue to live in the house?
A. Yes, sir.
Q. For how long?
A. About five days.
Q. And did he continue to ask you about the de-

tails of the affair?

A. Yes, every night when he got in from work, he would start in again.

Q. Did you give him those details?

A. I did, under objection.

Q. What do you mean?

277 A. I said, "This is making you unhappy, there is no reason for going into it," and he said, "I want to hear it, I want to hear everything."

Q. Did you ask for his forgiveness?

A. Did the first night.

Q. What did you say?

A. He said, "Do you think we can make a go of
278 it?" and I said, "If you are as forgiving as you seem to be now, we can make a go of it, and make it better than before."

Q. Did you live together as man and wife?

A. No.

Q. He was still mad with you?

A. Yes.

Q. Did he take you to Richmond?

279 A. Yes, he did.

Q. What was the occasion?

A. He got mad because I had written the psychiatrist to tell him that Aubrey knew everything and was being pretty arbitrary, and I said, "If you will let Fin in on this we will go and talk it over with him," and he agreed, and I told the children I would be back the next day and we got in the car and drove into Richmond, and
280 as we got off the four-lane highway he said, "I am going to divorce you and take the children," and I said, "You can't," and he said, "I can," and I said I would fight him, and he said, "You had better see a lawyer."

Q. What did you do then?

A. I told him —

Q. You were still in the car?

A. Yes. I said, "Take me to Fin's house," and he did, and no one was there, and I said, "Take me to Mother's," and he took me to Mother's house, and no one was there, and I got out, and he said, "Put the suitcases 281
out, I don't want to see you again," and I did.

Q. Did you later try to see if the children were still there?

A. I called Aubrey, because I had told them that I would be back the next day, to ask him if he were going back to Sanford, and ask if he would drive me back, and he said he did not know, and I said, if he were driving, I would go with him, and if not, I would take the 282
12 o'clock train, and he said, "Call me in the morning," and when I called him again he said, "I am not going," and I said, "I will take the 12 o'clock train."

Q. What did you do?

A. Aubrey said, "Don't go back."

Q. Did you find the house closed?

A. Yes, Aubrey had told me I would not be able 283
to see my children, I had better not go back, I had better see a lawyer.

Q. Were the children there?

A. No, my sister and I looked.

Q. What did you do?

A. We looked; we called all the hotels around there, and got no inkling where they were, and drove to Southern Pines, and called the hotels and motels in Greensboro 284
and Raleigh and it was late, and took a room at Southern Pines.

Q. What did you do? Did you spend the night in a motel?

A. No, went back over to Sanford to try again. Looked through the house to see how many clothes were gone, and we remembered that Dorothy did not drive the car.

Q. Who is Dorothy?

A. The German girl; that meant they had been driven, and I thought Buckshot had driven them.

Q. Who is he?

A. The chauffeur for Sanford Tobacco Company;
285 we went to see where he lived, we passed the road, and finally did find Buckshot.

Q. Did you discover where the children were?

A. He told us where they were.

Q. Where were the children?

A. In a motel in Fayetteville, North Carolina, with the maid.

286 Q. Did you proceed to Fayetteville, North Carolina?

A. Yes, we did.

Q. Did you get the children?

A. The next day; Aubrey was there when we got them.

Q. Where did you take them?

A. To Richmond.

287 *The Court*: And brought action?

A. Yes.

Q. Believe you stated who was with the children?

A. With his mother and Dorothy at the motel.

Mr. Walker: Did she say when she obtained the children in Fayetteville?

A. Not when I called the night before, Aubrey was
288 not there; got them the next day.

Q. You called and he was not there?

A. He had gone to Sanford, North Carolina.

By Mr. Carter: When you got the children, did you proceed to Richmond?

A. Yes, I did.

Q. Did you keep the children until your husband and you entered into an agreement as to the custody?

A. Yes.

Q. Was this agreement undertaken on your behalf by your attorney?

A. The agreement about the children?

Q. Yes. 289

A. Yes.

Q. Did you enter into that as a permanent arrangement?

Objection by Mr. Walker.

By Mr. Carter: We can testify as to this arrangement.

The Court: The instrument would have expressed that; let her explain it, but I will look at the instrument before I make a decision. 290

Q. (Resuming): It was an agreement relative to the custody of the three children?

A. Yes.

Q. And you were to get the children approximately two months out of the year, plus Christmas, holidays, and some reasonable vacation? 291

A. Yes.

Q. And he was satisfied –

Mr. Walker objected.

Court ruled he would go into that later.

Q. After you entered the agreement, did you move to Greenville, S. C.? 292

A. Yes, I did.

Q. What did you?

A. I went to Draughon's Business School until I got a job in Henderson's Advertising Agency, where I got a job writing copy.

Q. Where have you been living?

A. McDaniel Heights Apartments.

Q. And you have the youngest child with you?

A. I had Jay for two weeks, until Christmas, he was taken back to Sanford.

By the Court: When did you begin taking care of
293 him?

A. When I got settled here the first of February, Jay was brought here.

Q. Who brought him here?

A. Aubrey's mother.

Q. His mother — Aubrey's mother — brought him to Greenville, the youngest child, and you have had him ever since?

294 A. Yes, sir.

By Mr. Carter: Barbara, have you always taken care of the needs of the children?

A. I certainly have.

Q. Did your husband complain about your conduct as a mother?

A. No, sir.

295 Q. I believe that you had this German girl in your home as a maid?

A. That is right.

Q. What was the relationship of this maid to the family? Was she considered as a servant or as a member of the family?

A. A member of the family.

Q. And treated as such?

296 A. Treated as such.

Q. Did you ever leave the home with the maid and your husband alone together?

A. With the children, yes.

Q. On numerous occasions?

A. To bridge, or to choir practice, that is about all.

Q. Have you ever come home in the evening after

being out and found anything unusual going on between your husband and the maid?

A. Yes, several times when I came in he was lying on the couch with his shirt off, and his undershirt off, and Dorothy was rubbing his back. 297

Q. Strike you as being unusual?

A. Yes, I did not like it.

Q. Do you feel it would be to the best interests of the children that the court award you the custody?

A. I do.

Q. Why?

A. Because I am a good mother to them, and children need their mother. 298

Q. Do you feel that this incident with a married man reflects on your ability as a mother?

A. No, not at all.

Q. If the court awards you the custody, you will support those children, will you not?

A. Yes.

Q. Do you know your husband's income? 299

A. Know what it was in 1958.

Q. What was it in 1958?

A. He had never told me what it was.

Q. How did you know what it was?

A. Went to his office, and found an old income tax receipt, I guess, that said the total income was $19,500, he had told me it was $12,000 or $14,000.

Q. You state that the income tax receipt indicated 300 it was $19,000?

A. Yes.

Q. And he had told you his income was approximately $12,000?

A. He did.

Q. What would be necessary for the children to be

maintained in the style they are accustomed to if the court sees fit to award you the custody?

A. Total, or broken down?

Q. By the month?

A. Approximately $350, and that does not include the rent.

301 Q. How much did your husband send you for the support of the children while they were in your custody this summer?

A. He sent $100 for all three of them — but for a while he paid half the rent.

Q. $100 a month, plus the medical bills I sent to him — $100 a month for all three.

302 *By the Court*: And one-half the rent?

A. And one-half the rent, which was $42.

Mr. Carter: Barbara, when you and your husband were living together, who carried the children to church, if anybody?

A. I did.

Q. Every Sunday?

303 A. Yes.

Q. Did your husband accompany you?

A. No, he was at the office.

Q. What is your church?

A. Episcopal.

Q. Do you attend regularly?

A. Yes, I sing in the choir.

Q. Did you attend regularly in other communities?

304 A. No, sir, because we were not regularly in other communities.

Q. You have attended the Episcopal church since you have been here?

A. Yes, sir.

Q. Who is your pastor?

A. Tom Roberts.

Q. You sing in the choir?

A. Yes, sir.

Q. Who is keeping the children for your husband, 305
while he is at work?

A. The woman that runs the kindergarten that I put Bonnie in last year is keeping the children.

Q. He has no relative keeping the children?

A. No.

The Court: Does she live in the home?

A. As far as I know. We could not find out, nobody 306
will tell me.

Q. Your only contact with the children in the last two months is over the telephone?

A. Right.

Cross Examination By Mr. Walker:

Q. Mrs. Ford, when you first married Aubrey, 307
what business was he in?

A. The tobacco business.

Q. And at the time you were each of you how old?

A. I was twenty-three, and he was twenty-five.

Q. Did you have to travel about on the markets a good bit in those days?

A. Yes, I did.

Q. And for a period of time you traveled with him 308
to a great extent, did you not?

A. Until just before my third child came.

Q. And lived in Maryland a period of time?

A. Two months.

Q. A little later his company sent him to Germany, for how long?

A. Supposed to be two years, only stayed six months.

Q. And one of his office superiors died?

A. Was sick, and because of the illness we came home.

Q. And because of the illness of the person ahead of him in the business, the company brought him back?

A. Yes, that is right.

309 Q. Then you established your home in Sanford?

A. Yes, in 1958.

Q. Prior to the time any of the children were of school age?

A. Yes, it was.

Q. In 1958 established a home in Sanford, and had the three children?

310 A. Yes, I had.

Q. The youngest had been born?

A. Yes.

Q. Had a nice home in Sanford?

A. The first one had a roof on it, wasn't too nice, but a year later moved into a very nice home where he is living now.

Q. Have any idea of the type of architecture – the

311 price range of that home?

A. The first one?

The Court: The second.

A. Approximately $17,000.

Q. A new home?

A. Brand new.

Q. You owned it?

312 A. No, rented it.

Q. The first place you were located in was temporary, until you found the second place?

A. For a year.

Q. How long after you were back did the German girl come to reside with you?

A. We got back in November, and she came over here in February.

Q. February, 1959?

A. No, 1958.

Q. When you referred to your twenty-six homes, were you not including temporary locations that you had in the early stages of your married life when you were traveling with him on the market to some extent? 313

The Court: She was with him, going around on his work, no use going into that.

Q. Then, in the early stages of the married life, you testified you had a great deal of difficulty?

A. Yes.

Q. But throughout the years, you continued as man and wife and had three children, and established a permanent home in Sanford, North Carolina? 314

A. Four years.

Q. Does he have a good job in Sanford?

A. Yes, very good.

Q. Always provided adequately in Sanford?

A. He did, over protest.

Q. In what way did he protest? 315

A. I had to beg him for money.

Q. What type of allowance did you have?

A. $40 a week, later got it up to $45 a week for everything.

Q. What did it include besides the groceries?

A. No groceries, laundry, cleaning, school clothes for the children, my clothes, club dues, rent and insurance. 316

Q. And out of your $45 allowance you clothed yourself and the children? How did you do it? Do it completely?

A. I had to make most of them.

Q. Clothed yourself and the children completely out of the allowance?

A. Yes, sir.

Q. What did they cost?

A. When I made them, about $7 apiece.

317 Q. You didn't buy any clothes that amounted to anything substantial in Sanford or Richmond or elsewhere?

A. Aubrey bought me a fur coat, his mother did.

Q. When was that?

A. Christmas, a year ago.

Q. And you wanted to go see a marriage counselor in 1957?

318 A. Wanted to before that; that was the first time anything was done about it.

Q. The one you selected was your brother?

A. No, I did it because he said I could not see anyone else.

Q. Would not let you discuss it with any other psychiatrist?

A. He said we didn't need any outside help.

319 Q. Having relations quite frequently at that time?

A. Yes.

Q. Work hard?

A. Yes, he did.

Q. Work hard at his job?

A. Yes, sir.

Q. And did he not do very well with it?

A. Did very well.

320 Q. During this period of a year and a half when you were in Sanford, and the German girl was residing with you, did you fix breakfast for your children and your husband in the morning?

A. Occasionally, not often.

Q. As a matter of fact, your husband would get up

for breakfast with the children, and the German girl would prepare the breakfast, and it was your habit to sleep until 10 or 11 in the morning?

A. That is wrong. Dorothy was the first maid we have had in our marriage; she was to feed the children, and I saw no reason for both of us to hang over the stove. I got up and took the children to school at a quarter of nine. 321

Q. How many were in school?

A. Two, Aubrey, III, and Bonnie.

Q. Now, you of course left the youngest child at home with the maid when you left to go take the two of them to school?

A. Sometimes. 322

Q. Would you not return home and frequently retire again?

A. I did maybe five or six times, for I have an incipient ulcer that flares up more when I was married to Aubrey.

Q. Frequently had an afternoon nap?

A. Always took an afternoon nap with the children.

Q. Thus in the home with the maid the situation 323 would be that she would get up, fix breakfast for your husband and the children, and you would arise later and frequently later you would go back to bed?

A. Five times, really.

Q. And every day after lunch?

A. Yes.

Q. And in the early summer, about the first of July, 1959, you took the children and this German girl 324 to Gloucester?

A. Yes.

Q. And your mother and your family has a cottage there?

A. My family.

Q. It is somewhat of a community for people from Richmond, is it not?

A. The majority of them.

Q. And both you and your husband had been residents of Richmond?

A. Yes.

Q. He was raised there and so were you?

A. Lived there from the time I was fourteen.

Q. And your husband asked you not to go to Gloucester in 1959?

A. Don't remember whether or not.

Q. He was unable to go?

A. Yes.

Q. Because of his work?

A. Yes, sir.

Q. And you knew that shortly after you returned from Gloucester that he would be going on the market? That he had to go in August?

A. Yes, he had to go in August.

Q. During this time, when you had your permanent home in Sanford, he was able and did stay in Sanford a great deal more than he had been doing prior to that time; is that correct?

A. When I went with him?

Q. I am referring to the preceding year and a half that you maintained a permanent home in Sanford, North Carolina, after your return from Germany. I am asking you if he was not able to and did stay in the Sanford home a great deal more than he had in the past?

A. Stayed more than he had when we traveled together. He would come home.

Q. Was he away from Sanford much during the fall months of 1958?

A. Yes.

Q. Extensively or occasionally?

A. In Kentucky a great long while, went out Christmas to visit him.

Q. How long does the Kentucky market last?

A. Don't know, three months. 329

Q. During the winter months, what market did he attend?

A. Don't know of any.

Q. Home from January 1, 1959, until August of 1959, when he had to go to the Georgia market?

A. No, he went to Europe.

Q. He did. 330

A. Yes.

Q. For how long?

A. Was only two weeks that trip.

Q. For two weeks in Europe, and otherwise stayed in Sanford from January until the August market?

A. Except for the Europe trip, that was always the case.

Q. You went to Gloucester for two weeks, and knew 331 he would be going on the Georgia market shortly after you came back from Gloucester?

A. Yes, that is right.

Q. And you were in Gloucester, were there with your friends from Richmond, were you not? In the afternoon was there not quite a lot of partying while you were in Gloucester?

A. In late afternoons. 332

Q. And that would frequently extend to the early hours of the night, would it not?

A. Yes, sir.

Q. And that was an every afternoon and night affair. Correct?

A. No, I think not.

Q. Out of two weeks, wasn't there a party every afternoon and night about five days a week?

A. During the weekends, when the husbands came down there was a good deal of partying, but during the week, no.

333 Q. And you were there during the Fourth of July weekend in 1959?

A. I was.

Q. That was the first weekend occasion of this affair with Mr. Sloan?

A. Right.

Q. And on two occasions that Fourth of July weekend you were out rather late with Mr. Sloan?

334 A. Yes, sir, during the Fourth weekend.

Q. During the Fourth?

A. He didn't even get there until the Fifth.

Q. The fifth of July instead of the Fourth; that was the weekend?

A. Yes, sir.

Q. And the first night you were out with him until the very early hours of the morning?

335 A. Very late.

Q. Who was at home with the children?

A. My mother, my sister, a colored maid and Dorothy.

Q. You were not attending to the children?

A. They were asleep.

Q. And the next day, did you attend to the children? Or were you again in company with Mr. Sloan?

336 A. During the day?

A. Yes.

A. Was with the children.

Q. Until early in the afternoon; did the Gloucester parties start early in the afternoon?

A. Not early, around 5:30.

Q. And you had an affair again with Mr. Sloan the following night?

A. Two nights.

Q. And then he went back to Richmond?

A. Right. 337

The Court: Is there any significance to this discussion?

Mr. Walker: Yes, sir, this is of paramount importance with respect to this case, in regard to the care she gave the children during this time.

The Court: Going to dispute she left the children with the maid and nurse? 338

Mr. Walker: No, sir, but there are ramifications; we think this affair, as it extended over a six weeks period, that the length and duration of it has some significance.

The Court: She admits it, over a period of six weeks, in her admission. Let's hurry along.

By Mr. Walker: And the same situation occurred during the following weekend, did it not?

A. That is right. 339

Q. And there was an affair with him again the last weekend you were in Gloucester?

A. Two weekends.

Q. You left Gloucester and went to Richmond?

A. To pick up the children that my mother had taken to Richmond, – to Sanford.

Q. Did you go to Richmond, and then to Sanford, or vice versa? Did you go to Richmond to take the children, or did you go to Sanford? 340

A. Went to Richmond.

Q. With all three children?

A. No, my mother had them. Had driven the children up the day before.

Q. How long did you stay in Richmond?

A. Spent the night, and returned to Sanford.

Q. Was your husband in Sanford when you returned there?

A. Yes, he was.

Q. And left on the 19th of July to go to Georgia for business?

341 A. Couldn't swear to that.

Q. He left about four days after you returned?

A. Take his word for it.

Q. You don't recall?

A. No.

Q. And on July 24 you went back to Richmond?

A. Around then, to get little Aubrey.

342 Q. And left the two children in Sanford with the German girl?

A. Right.

Q. And when you went to Richmond that time, it was for the weekend?

A. Mainly to get little Aubrey.

Q. The first afternoon and night you were in Richmond, did you or not go to a party at the Young home?

343 A. I did not.

Q. Go the second night in Richmond?

A. Yes, sir.

Q. And lasted from the beginning hours until approximately midnight?

A. Right.

Q. And of course little Aubrey was not with you at that time?

344 A. No, sir.

Q. You stated that of course you were not caring for little Aubrey when you were at the Youngs?

A. He was asleep.

Q. And you returned that afternoon, that evening, from the party, or left the party with whom?

A. With the wife of a friend of ours and the man in question.

Q. And he took the wife of the friend home and where did you and Mr. Sloan go?

A. Went to a trailer he had. 345

Q. Did you not stay there until 6 o'clock in the morning with him?

A. Don't think it was 6.

Q. What time was it?

A. Four o'clock at the latest.

Q. Did he take you home at 4 o'clock in the morning?

A. No, I drove home; he stayed there. 346

Q. What time did you return to him the next morning? Did you not go by the Young house and fix breakfast for him?

A. Fixed some coffee.

Q. Stayed with him until 3 o'clock that afternoon?

A. I did not.

Q. Did not? 347

A. Went immediately back to town.

Q. How long were you away from there when you went to fix the coffee?

A. About an hour.

Q. Went back home immediately?

A. To the Youngs, and my brother's house.

Q. You left Mr. Sloan at the trailer that morning?

A. He had his car. 348

Q. You left him there?

A. No, we left at the same time.

Q. You had relations with him the night before?

A. Yes.

Q. And the next day?

A. No.

Q. Returned to Sanford on about July 27, correct?

On the Monday following this weekend in Richmond?

A. I thought it was Sunday; maybe it was Monday.

Q. The party was Saturday night?

A. Yes.

349 Q. And did you go back to Sanford the next afternoon, or the day following?

A. Think I went back Sunday.

Q. After the Saturday night in the trailer, and the morning visit, you think you went back to Sanford?

A. Think so; don't remember waiting.

Q. And your husband returned to Sanford on the

350 31st of July?

A. Don't know.

Q. And as soon as he got back from his first trip, you told him you were going to go back to Gloucester again?

A. Yes.

Q. And he did object?

A. Always objected to my going to Gloucester or

351 anywhere else.

Q. He was just home for the weekend?

A. Yes.

Q. And had returned to Georgia — had to return about August 2, two or three days later?

A. Guess so.

Q. And although he had objected, you did not discuss it with him?

352 A. We never discussed it.

Q. Although he had objected, you left for Gloucester by yourself before he returned from the Georgia market?

A. Left the same day.

Q. Left before he came home or not?

A. We left the same day.

Q. He returned that day?

A. He and I left the same day.

Q. And at this time your husband did not know anything of this affair, as far as you know?

A. No.

Q. You feel rather certain he did not? 353

A. No.

Q. And you went back to Gloucester and left the children in Sanford?

A. With Dorothy.

Q. Knowing he would be away on business?

A. That is right.

Q. Do you know that he returned to Sanford on the 7th of August? 354

A. Left on the 7th of August.

Q. Was back in Sanford a week or so before you got back?

A. He was.

Q. Who did you stay with the second time?

A. My sister, Betsy Rouse.

Q. Have any visits from Mr. Sloan while you were in Gloucester? 355

A. He came – nothing happened.

Q. But he was there?

A. Yes.

Q. Both weekends?

A. Yes.

Q. And you saw him?

A. Yes. 356

Q. And did attend parties together, and so forth?

A. Yes.

Q. Went to Richmond, did you not?

A. Yes, after ten days in Gloucester.

Q. And when you were in Richmond, you contacted Mr. Sloan?

A. Yes.

Q. And during this entire period of time, from the 7th until the 16th or 17th, the children were in Sanford with the German girl?

A. And Aubrey.

357 Q. And he was there with them after he had come back from his business trip?

A. Yes.

Q. Have any meeting with this Mr. Sloan when you went to Richmond?

A. Yes, I did.

Q. Went with him to Bowling Green?

358 A. Not Bowling Green – somewhere near.

Q. And spent the night?

A. Yes.

Q. And returned to Richmond?

A. Yes.

Q. While you were back in Richmond, did you contact your husband and notify him or advise him you had left Gloucester and were back in Richmond for a short

359 time?

A. No, sir.

Q. Contact your family?

A. My mother knew I was there.

Q. Your mother lived in Richmond?

A. Yes.

Q. But you did not contact your husband, the children, or the German girl to let them know you had

360 left Gloucester and were in Richmond for a short time?

A. Don't know whether Dorothy knew or not; did not contact Aubrey.

Q. So far as your family was concerned, you made no contact?

A. No, sir.

Q. How long did you stay in Richmond?

A. Two days, I guess, left the second day.

Q. Returned the day you left Bowling Green?

A. The day after that.

Q. The afternoon following your evening in the motel near Bowling Green, did you not call your husband and tell him you were not coming back to Sanford that evening because your mother was ill? 361

A. Don't remember that.

Q. You didn't make any call?

A. Don't think I did.

Q. Stayed away for a period of approximately two weeks in Gloucester, Richmond and Bowling Green, and made no contact with your husband and children? 362

A. Made contact with my children.

Q. How?

A. In Gloucester.

Q. Telephone them?

A. Yes, three or four times from Gloucester.

Q. Then upon your final return to Sanford, you were confronted with the fact that someone had told of this affair that had been going on for seven weeks? 363

A. Told Aubrey.

Q. As a matter of fact, you told some friends about the affair?

A. Told my sister, told my mother the last weekend in Richmond, told Janice Young.

Q. And Janice Young is one of your very dear friends?

A. Yes. 364

Q. Have her affidavit in the case?

A. Yes.

Q. Is she here?

A. Her husband is.

Q. Down at Gloucester during the first period?

A. Yes, sir.

Q. Told her then?

A. Yes, sir.

Q. While you were both at Gloucester at this time?

A. Yes.

Q. Also told your sister?

365 A. Told my sister when I left Gloucester the first time.

Q. Did you not tell one or two other of your friends?

A. No.

Q. Did you not confide in this German girl?

A. Yes, I did.

Q. Confided to her the intimate matters of your affair?

366 A. Yes.

Q. And you confided in her while you were in Gloucester?

A. No, on the way home from Sanford to Richmond.

Q. Then the German girl had been told of the details prior to the time that you went back to Richmond for the party the night of the trailer affair and prior to 367 the time you went back to Gloucester?

A. Yes.

Q. Consequently there were a good many people, several people, among your social friends, who were aware of it?

A. One friend and Dorothy and two members of my family.

Q. Did you tell either one of your brothers or step- 368 brothers?

A. My mother wanted me to tell the psychiatrist — that is the one I told.

Q. You told — how many stepbrothers do you have?

A. Two — and one brother.

Q. Did you tell both?

A. No, the psychiatrist.

Q. And the sister in whom you confided is a full-blood sister?

A. Yes. 369

Q. Married to the psychiatrist?

A. Yes.

Q. And your full-blood sister is married to your step-brother?

A. Correct.

Q. And you have another step-brother in whom you did not confide? 370

A. Correct.

Q. Two members of your family, and two other people to whom you were not related?

A. Yes.

Q. And they all knew the affair from the first steps?

A. The first two weeks.

Q. You tesified with regard to the conversation and discussion with your husband after you were back 371 from Richmond the last time?

A. Yes.

Q. Approximately what time last summer was that?

A. It would be about the 19th – I went to Richmond on the 26th.

Q. Of August?

A. Of August, yes.

Q. And you referred to getting the children. Of 372 course, at the time of these discussions with your husband, you were determined that if there were a separation that you would have the children, and no doubt he had the same determination?

A. Not determined, not at the time. I had no idea of leaving Aubrey, he had asked me if I thought our

marriage would work, and I said it would. I had a divorced mother and father, and to have the children with one parent is the last thing I wanted.

Q. Think of that while you were having this affair?

A. No, didn't think.

Q. During the six or seven weeks this was going on?

373 A. No.

Q. While you were talking with him, talking with Aubrey, and he was asking about it, you objected to telling him?

A. Said when I had made the confession I didn't think it was to his advantage to know all the details.

Q. Didn't want your husband to know all the facts

374 of your adultery over an extended period of time? Something he had no right to know?

A. I did not, and I do not.

Q. Think he had no right?

A. Would not help him, it would hurt him. I have sinned and am sorry, and there is no reason why he should know.

Q. Any reason why he should want to know?

375 A. Suppose he did, but it would hurt him.

Q. With reference to the time of the motel where his mother and sister had carried the children, that is who went with the children at the time you and your sister went there?

A. No, not his sister, Dorothy and his mother.

Q. At that time, were you and your sister – you got the children and went to Richmond?

376 A. Yes.

Q. And then at Richmond there was this controversy that went into the court?

A. Yes.

The Court: All that is admitted.

Mr. Walker: We would like at this time, if your Honor please, to formally introduce this record, it is attached to the copy of the answer – we would like to formally introduce it so that it may be identified. Richmond record regarding letters between the attorneys introduced into the record as Exhibit 3.

377 *Mr. Walker*: If Your Honor please, as I understand it, they have admitted that the agreement was made in her behalf by her counsel and in Mr. Ford's behalf, by his counsel.

The Court: I presume in consultation with their respective clients.

Mr. Carter: We have the original for this court.

378 *By Mr. Walker*: What was the name of the attorney representing you?

A. Alex Parker?

Q. And subsequent to that agreement, you came to Greenville?

A. Yes.

379 Q. And as soon as you were located, I ask you if your husband, in accordance with what he had said that he would consider, if he did not arrange for the youngest child to come and stay with you?

A. He did.

Q. And the two oldest children stayed in Sanford with him to finish the school year, and his mother was there during that period of time?

A. Yes.

380 Q. With regard to what was accomplished pursuant to this agreement, I want to ask you if in addition to arranging for the youngest child to come to you in accordance with your wish, did he not at the end of the school year bring the two older children to you?

A. His mother did.

Q. In every sense of the word, he was acting as he had agreed to do?

A. He did.

Q. You had the children in Greenville from about June 20 until this suit was instituted?

A. Yes.

381 Q. And had the children for a period of time following the institution of this suit when they were sent to Sanford pursuant to the order of the court?

A. Jay stayed two weeks.

Q. After the eldest had gone back to school?

A. Yes.

Q. There was no provision to your knowledge for
382 your husband to support you after this separation?

A. No.

Q. Nevertheless, he did for a period of several months pay your entire rent, did he not?

A. About three, I think.

The Court: How does this affect the question at issue?

Mr. Walker: Affects the credibility, because of
383 what she has testified about her needs and requirements and with regard to what he has done for the children during this time.

The Court: I am interested in what he is requested to do now. The morning's testimony showed that he had paid her rent -- why?

Mr. Walker: Apparently a gratuity that he was
384 giving her.

Q. What was the figure you said would be required to support you?

A. Guess $350 a month, that does not include the rent.

Q. Does this represent an itemized list you made out? (This paper showed to witness.)

A. I made it out.

Q. And it was in connection with asking Mr. Ford to provide more money for support?

A. Yes.

385 Q. And is an itemized statement of your expenses from February through March?

A. Just the ones that would refer to him . . . not my rent.

Q. Look and see?

A. Yes, I did.

Q. Matter of fact, this is a rather complete statement, is it not, with regard to your living expense require- 386 ments?

A. So far as I know, but there was only one child.

Q. Rent, $86.50; servant at 4 weeks, $106.50; plus choir rehearsal baby sitting fees; you had baby sitting fees other than for choir rehearsal. Also an item of whiskey, $7.40.

A. Whisky for me?

Q. Is that your handwriting? 387

A. Yes.

Q. This your handwriting?

A. Yes, sir.

Q. Dated February 26, 1960, to March 26, 1960, estimate of expense $393. The estimate admitted in evidence as Exhibit 4.

Court recessed at 12:30 P.M., reconvened at 3:00 388 P.M.

Mrs. Ford still on the stand, being cross examined by Mr. Walker.

Q. Mrs. Ford, you did testify on direct examination with regard to this trip that you and Mr. Ford took

to Richmond, I think it was in the latter part of August, 1959, and I think you referred to it as being a trip to Richmond to see your brother?

A. That is what he told me.

Q. Now, I want to ask you if along the close of that trip, as you were driving, if you did not have further
389 discussion of this affair that you had over an extended period of time?

A. He asked for more details again.

Q. And in connection with what you said to him with regard to the discussion, ask you if you did not say that you knew you were wrong, but you were not ashamed?

390 A. Deny that, did not ever say it.

Q. Also I want to ask you, and would put you on notice as we do in legal procedure that we would offer testimony to contradict you, in regard to this discussion or conversation about this man, Sloan, if you did not say to your husband that to know him is to love him?

A. I did not say it that way.

Q. How did you say it?

391 A. Said, "You had to know Jim Sloan to like him."

Q. Deny that you used the word, "love?"

A. I do.

Q. But did say you have to know Jim Sloan to like him?

A. Yes.

Q. About the 20th of June, 1960, after school was out this past June, Mr. Ford made arrangements for the
392 children to come to Greenville to be with you during the remainder of the summer, as he had agreed to do?

A. Yes, sir.

Q. You had the youngest child with you, with his consent, and in line with the spirit of the agreement that had been worked out between you in Richmond?

A. Yes, sir.

Q. Now, about August 30, after this suit was instituted and some two or three weeks after the papers were served on your husband, I want to ask you if you did not write to Mrs. McIver who is a friend of yours in Sanford? 393

A. I did.

Q. And if you did not write these words to her, and I quote: "I have not broken the agreement, as Aubrey so bitterly asserts, because the agreement so far as I was concerned ended with Mrs. Ford's death?" (Mrs. Ford, Mr. Ford's mother) 394

A. Yes, sir.

Q. For the record, Mr. Ford's mother died about August 2 or the last of July?

A. (By Mr. Ford – the 4th of August, 1960.)

Q. Mrs. Ford, was that statement that you wrote in the letter to Mrs. McIver your position with regard to the agreement?

By Mr. Carter: If you are going into the agreement, I reserve the right to go into it fully. 395

The Court: Better stay off the agreement right now, for it speaks for itself, regardless of her opinion on it.

By Mr. Walker: Then, Mrs. Ford, I will ask you if you did not employ counsel and set about the institution of an action in this court on or about the 13th of July, 1960? 396

A. I do not know the date; I did it.

At this point the Court acknowledged judicial notice of the action.

Q. I assume the original suit, dated on July 13, is a part of the record of the case?

By Mr. Carter: No, it is not a part of the record

in this case, was sent back to me, was not served.

By Mr. Walker: I am pointing to this, the amended complaint dated August 3, 1960, and the temporary order likewise dated August 3.

The Court: Is all of that filed with me?

By Mr. Carter: Not all of it.

397 *The Court*: Without going into the legal question—

By Mr. Walker: Would ask whether or not the original complaint was part of the record.

By Mr. Carter: The original complaint, from which the amended complaint was made.

By Mr. Walker: I am asking about the original complaint.

398 *The Court*: Do not have anything but the amended complaint; assume there was an original complaint, but you say it was not filed nor served, and was withdrawn?

By Mr. Carter: Yes, sir, never did get service on the original complaint. The original complaint, dated July 13, 1960, marked in evidence as Exhibit 5.

By Mr. Walker: Assume so, never saw it.

The Court: You authorized your attorney to take
399 whatever proceeding he took as your attorney?

A. (By witness): Yes, sir.

The Court: Dated July 13, verified on the 28th. Filed here, never marked.

Mr. Walker stated he obtained a copy of it from Mr. Carter. Testimony resumed:

Q. And within less than three week's time after your
400 husband had arranged for you to have the children during the balance of the summer, you had employed counsel and set about the institution of this action?

A. Yes, sir.

The Court: Is that a matter of argument? She authorized it and it has been done.

By Mr. Walker: The purpose of my question is the date.

By Mr. Carter: It is admitted.

By Mr. Walker: It is, and in addition I want to get it into the record. 401

The Court: Mr. Carter will admit a good many things if you ask him.

By Mr. Walker: On or about August 8, did not Mrs. McIver come to see you in Greenville?

A. She came, I do not know the date.

Q. And as a matter of fact, it was the day prior to Mr. Ford's coming to Greenville to see the children? 402

A. Don't think so, don't think he came the next day.

Q. Well, he did call you and talk with you after his mother's death, did he not?

A. I called him.

Q. And in the conversation that you had he talked with you and told you he would like to come to Greenville to see the children and explain to them the death of their grandmother? 403

A. Didn't say that.

Q. What did he say?

A. Said he wanted to come to Greenville to see the children and take all three of them.

Q. Did he or not mention to you about explaining the death of their grandmother?

A. No, sir, I told him I had explained it to two of them, and wanted him to explain it to Bonnie. 404

The Court: Is Mrs. McIver the mother of Mr. Ford?

By Mr. Walker: No, sir, it is tied in with the time.

Q. Mrs. Ford, did you not say that you had told little Aubrey, and it would be better for him to explain it to the other two children, the younger ones?

A. Told him that when he came.

Q. He did come to Greenville and to the apartment to see the children?

A. Yes, sir.

Q. And you did agree to have the children to see him, and go to the motel, to go to see him?

405 A. I talked with him first, said he wanted to talk to them first, and I said, "Why?" and he said he wanted to talk to them; since his mother was dead I said he had no one to care for the children, and he said he had someone to take care of the children.

Q. Three weeks prior to that you had employed counsel, and the suit had been drawn? Right?

406 A. Yes, I wanted it back and held it, really did not want it delivered to him on the date of his mother's death.

Q. But you had instituted the action and verified it prior to the time of his mother's death?

A. Yes, sir, those children belong to their mother, if you do not have both parents.

Q. But had started the action without knowledge

407 of their grandmother's death?

A. Yes.

Q. The conversation with Mr. Ford, after his mother's death, did it have any influence upon whether or not you were going to serve him later?

A. He had not been served, and wasn't going to be served. I wanted to talk to him, and asked him to talk about it. When he said there was no chance for us

408 to get together, I had no choice.

Q. The fact of his mother's death had nothing to do with whether or not this action was instituted, because you had already employed counsel and it had already been sent to the sheriff in Sanford for service?

A. You are right.

Q. Now, several days after Mrs. Ford's death, and the day prior to Mr. Ford's coming to Greenville, to see the children, Mrs. McIver came to Greenville to see you?

A. Yes, sir.

Q. And came with her children and called on you 409
at your apartment?

A. Yes.

Q. Your mother was there?

A. No, oh, you are right, she was; she left just after Lucy Cooper got there.

Q. When Mrs. McIver came in to your apartment to visit with you and your mother, you and your mother 410
were sitting about the apartment, having a drink?

A. Yes.

Q. Mrs. McIver had some conversation with you?

A. She did.

Q. At that time, it was August 7 or August 8, the day prior to service on Mr. Ford, and again I put you on notice —

By Mr. Carter: Object to the notice, we know she 411
is on notice.

The Court: The ruling is to give notice, give her a chance to contradict.

By Mr. Walker: I give it because the rule requires it.

The Court: It is not a threat, but puts her on notice she would have to be careful.

By Mr. Walker: Mrs. Ford, I ask you if Mrs. Mc- 412
Iver did not ask you about some talk of reconciliation, and if you did not tell her at this time, in these words, or words to this effect, that "there was no possibility of reconciliation, and you would not consider it?"

A. No, sir.

By Mr. Carter: We have the right to go into the reconciliation efforts fully.

By Mr. Walker: This is just in regard to a conversa-
413 tion that took place.

A. I never said I would not consider reconciliation, but I did not think Aubrey would. But I thought it would be best for the children if both parents could live together in a decent atmosphere. Never said I would not consider a reconciliation.

Q. But you did not think it would be worthwhile?

A. Did not think it would be worthwhile.

414 Q. On the same occasion did you not tell her you were going to take the children from your husband, on the same day, that you were going to take them, and there was no possibility of a reconciliation so far as you were concerned?

A. No, I said, "I could," I did not say I was going to take the children.

Q. You knew he was coming the next day?

415 A. He did not come the next day.

Q. You knew he was coming?

A. Aubrey called the day before he came.

Q. Did you not know he was coming down here to visit the children, with regard to being with them and telling them about his mother's death? And at that time, the time you had knowledge of his coming, and that he
416 would be there, when he did come in, and came to your apartment for the children, at that time the suit papers were served on him by the deputy sheriff at the time of his arrival?

A. Which one do you w[illegible]t me to answer?

Q. I asked only one question: (1) Referring to the fact that it was known he was coming to see the children?

A. Yes, I guess, really don't remember, but suppose I did.

A. Don't know.

Q. At the time he came to Greenville and came to your apartment, the officer was waiting to serve him with the papers, was he not? 417

A. Yes, he was.

Q. Did you not know that he was coming?

A. I did not know when I talked to Mrs. McIver; I know that he was coming.

Q. You did not know when she was there?

A. Right. 418

Q. Don't remember whether it was one or two days right preceding the arrival of Mr. Ford in Greenville?

A. No, maybe.

Q. It was subsequent to Mrs. Ford's death?

A. No, when Mrs. McIver was here, don't think Mrs. Ford was dead.

Q. Want to check that.

A. It seems that Mrs. McIver told me what good care she had taken of the children; don't remember. 419

The Court: Rule it not vital. She admits she had him served when he came to the apartment.

By Mr. Walker: The death date of Mrs. Ford was August 4, and date of service August 9; would like it to show in the record.

Mr. Carter asked that this witness be allowed to get down now, with the right reserved to re-examine her on direct examination later in the hearing, as plaintiff had some witnesses who had to catch a plane that afternoon. 420

Mr. Walker agreed if it is only on re-direct. "If you are intending to take this witness off, if the court permits it, but by the same token I object to withdrawal of this

witness at this time if you intend to bring her back later for entirely new matter."

Mr. Carter: This is a court of equity, and has the right to bring in new matter later.

421 The Court granted Mr. Carter's request, and allowed the witness to rest.

MRS. JOAN GALLIVAN, witness for the plaintiff, being duly sworn, testified:

Direct Examination by Mr. Carter:

Q. Mrs. Gallivan, you are married to James Gallivan?

422 A. Yes, sir.

Q. How long have you lived in Greenville?

A. Five years.

Q. How long have you known Barbara Ford?

A. Three years — prior to that my husband knew her.

Q. Prior to that your husband knew her?

423 A. Yes, by correspondence.

Q. Had occasion to know her in the last year — or three or four months?

A. Yes, I have seen her often?

Q. And where was that?

A. I have seen her with the children on numerous occasions, have seen her at church every Sunday.

Q. Do you go to the same church here?

424 A. Yes.

Q. Christ Church?

A. Yes. I have seen her at night when she has been out with us and had dinner with us.

Q. Have you seen her on numerous occasions with her children?

A. Yes, I have on many occasions. Have seen her

before she was in Greenville when she came there, was there a weekend with her children.

Q. Did she visit in your home with the children?

A. Yes.

Q. Did you visit in her home? 425

A. Yes.

Q. What observations have you made with reference to her attitude toward the children, and theirs toward her?

A. She has been very affectionate toward them, and they are fond of her, they are good children, well-trained and disciplined, they seem to mind her; have 426
seen her with a group of children, they seem to be affectionate toward her, all of mine are.

Q. She is a good parent, has control over the children?

A. Yes, I think she is; have seen her under several circumstances when she visited in our home, and I was very much impressed with the way she said her prayers with the children, had them say their prayers; never been 427
able to get my children to say them – impressed with her, she made clothes for the children.

Q. Have you visited in her home in the apartment?

A. Yes.

Q. What type of apartment is it?

A. Small, partly furnished, but very neat and tidy, and very well kept.

428

Cross Examination By Mr. Walker:

Q. As I understand it, you have known her for three years?

A. Yes.

Q. Did you know her prior to the time that she moved to Sanford?

A. Only by correspondence with her.

Q. Your acquaintance began after they lived in Sanford?

A. Yes, sir.

Q. And after their stay in Germany for about six months?

A. I corresponded with her, had never seen her.

429 Q. Your husband and her husband friends?

A. Don't know that they are.

Q. You visited in her home – she visited in your home only since she was living in Greenville?

A. She visited several times, and stayed in my home.

Q. When was that?

A. Three years ago; I had never seen her before.

430 That was the first time I had ever seen her.

Q. At that time, they were residents of Sanford?

A. No, sir.

Q. And there was no rift or difficulty between her and Mr. Ford at that time?

A. No, sir.

Q. Here in Greenville, since she has been here, how frequently would you say she has visited your place?

431 A. Well, mostly, she has been to my house with the children.

Q. That would be subsequent to June 20, 1960?

A. Well, beginning in January, 1960.

Q. Then she visited with you some when she had only the youngest?

A. Yes, yes, quite a bit with the youngest child, and then at times she had the other children with her,

432 in the spring; have seen her with all three children every time she had the children here.

Q. All the time, or at night?

A. In the day on several occasions, she had Sunday night supper with us, or Sunday dinner; during the week we have been swimming together.

Q. Have you known her husband?
A. No, never met her husband.
Witness down.

THE REVEREND T. A. ROBERTS, plaintiff's witness, having been sworn, testified: 433

Direct Examination By Mr. Carter:

Q. You are the priest of the Episcopal church here in Greenville?
A. Yes.
Q. How long have you known Barbara Ford?
A. Since about last March. 434
Q. March of 1960?
A. Yes.
Q. Has she been regular in her attendance at the church?
A. Yes, she sings in the choir.
Q. Ask you, immediately upon arrival here did she consult with you about her marital problems?
A. I don't know of my own knowledge about im- 435 mediately upon her arrival.
Q. When did she consult you?
A. March, sometime.
Q. March, 1960?
A. That is right.
Q. And as her priest, you have advised her in that connection? 436
A. I have.
Q. Have you had occasion to visit her, and see her with her children?
A. No visits in her home; but know she brought the children to Sunday School. Have had no contact with the children.

No cross examination by the defense.
Witness down.

By Mr. Walker: We have the children here, pursuant to subpoena, duly issued. No question of the legality of the subpoena itself. However, we do object to children of such a tender age being brought into court.

By the Court: How old are they?

437 A. One is seven and a half; one five and a half; and three and a half.

The Court: I have allowed it.

By Mr. Carter: Have no request with regard to calling the five and a half, and the three and a half.

By Mr. Walker: We have the children here, and the seven and a half year old can be brought over right away.

438 Let the record show that we object, and do not approve of a child of that age being called.

The Court had the child summoned, and while waiting for the child, Mr. Walker asked:

Q. May we inquire as to the reason for which they wish the child?

By Mr. Carter: We will be happy to tell you after the child gets here.

439 *By Mr. Davenport*: In the presence of the child?

By Mr. Carter: No, but I think the child should be allowed to testify.

By Mr. Walker: Would like to know if we can have the reason.

By Mr. Carter: After the child gets here.

The child was brought to the outer office, and before calling him to the stand Mr. Carter explained the

440 reason for calling him:

The purpose is to testify to a conversation he had with his mother on two occasions about waking up and finding the maid, Dorothy, in bed with his father. He confided in his mother, and she took a record of it.

By Mr. Walker: When did this conversation take place?

A. In November or October.

Q. October or November of 1959?

A. Yes, the second on December 22, and she recorded it without his knowing it.

By Mr. Walker: October of 1959 and December of 1959. 441

By Mr. Carter: On two occasions he related to his mother what he saw – we have the tape recording if you wish to hear it.

By Mr. Walker: We know nothing about the tape, or the circumstances under which the tape recording was obtained. 442

Point out that in Paragraph 4 the plaintiff alleged that the defendant has been guilty of adulterous conduct and is an unfit person to have control of the children of the parties. That allegation was abandoned in the amended complaint and that says that upon information and belief that the defendant is guilty of gross misconduct, and is unfit to have the custody of the minor children of the parties – if that is an effort to go back 443 to the allegation deliberately omitted –

By Mr. Carter: If this testimony stands up, we allege it is gross misconduct, for, whether there were sexual relations or not, they were in a state of undress in bed together – that is certainly gross misconduct in the presence of the child, in the same room with the child.

The Court: I am going to let him testify. 444

The parents were asked to get to one side, and the child was brought into the court room, and was put on the stand, but was not sworn.

AUBREY FORD, III, testified:

By Mr. Carter: Aubrey, how old are you?

A. Seven.

Q. Like school?

A. Love it.

445 Q. What is your favorite subject?

A. Writing.

Q. What do you write about?

A. Stories and lots of stuff.

Q. Pretty interesting business; never a very good writer myself. Do you remember back before your mother and father were separated? Remember when Mother came to Greenville?

446 A. No.

Q. Remember a maid by the name of Dorothy you had at your home?

A. Yes.

Q. Good friend of yours?

A. Yes.

Q. Like her?

A. Yes.

447 Q. Pretty good friend?

A. Yes.

Q. Ever kiss you?

A. No.

Q. Ever see her kiss your father?

A. No.

Q. Ever see her in your bedroom?

A. It was my father's bedroom.

448 Q. Whose was it?

A. My daddy's.

Q. What was she doing?

A. Lying by him.

Q. How was she dressed?

A. Don't remember.

Q. Have her clothes on or not; do you remember? You can't remember?

A. No.

Q. How was your father dressed?

A. Don't remember.

Q. See him kiss Dorothy? 449

A. No.

Q. Lying beside her?

A. Yes.

Q. On the bed?

A. Yes.

Q. You slept in the room with your father?

A. Yes. 450

Q. How long had you been doing that?

A. Forget.

Q. Since your mother left?

A. Slept in my room some of the time.

Q. Did you see this happen on more than one occasion? See her lying in bed with him on more than one occasion?

A. No. 451

Q. Just once?

A. Yes.

By Mr. Walker: Aubrey, do you remember how long your mother and daddy have been away from each other?

A. No.

Q. Remember how long ago it was when Dorothy lived with you? 452

A. No.

Q. Remember how old you were when she lived with you?

A. I think I was six.

Q. Think you were about six when she lived with you? About a year and a half ago?

A. Yes.

Q. Knew her in Germany?

A. Yes.

Q. Lived in Germany?

453 A. Not long.

Q. How long?

A. I can't remember, think it was about a month, close to that.

Q. Did she come back from Germany with you?

A. Don't remember.

Q. You stay in your room now? Have a room of

454 your own?

A. Not of my own; sister stays in that room some.

Q. You and your little brother have a room together?

A. No.

Q. You and your sister?

A. Yes.

Q. How long did you know Dorothy?

455 A. Can't remember; knew her when she came to our house.

Q. She used to take care of you a lot?

A. Yes.

Q. Play with you?

A. Sometimes she had to clean up the house.

Q. Couldn't play with you then?

A. No.

456 CHURCHILL YOUNG, plaintiff's witness, having been duly sworn, testified:

Direct Examination By Mr. Carter:

Q. How long have you known Barbara?

A. At least fifteen years.

Q. Did you know her when she lived in Richmond with her husband?

A. Yes.

Q. Have occasion during her married life to see her frequently?

A. Yes.

Q. What were those occasions?

A. Used to come to my house quite often with her children, and in 1957 when she was living at the end of the block from me.

Q. How often did you see her in 1957, would you estimate?

A. Two or three times a week with the children in most every instance.

Q. See her in 1958 and 1959 also with the children?

A. 1959 was living in Richmond at her mother's house.

Q. Have occasion to observe her reaction to the children, and their reaction to her?

A. In every occasion I saw her she was very attentive to the children, the mutual feeling between them was obvious.

Q. Exercise proper control?

A. She did.

By Mr. Walker: How long have you known Aubrey Ford?

A. Since we were seven or eight years old.

Q. Always been good friends?

A. Yes.

Q. Still are?

A. Yes, sir.

Q. Throughout the years, have you been social friends, gone together, circulated with the same group of people in Richmond?

A. Yes, sir.

Q. Do you have a high regard for him?

A. I certainly do.

Q. At all times that you have known him, has he conducted himself as a gentleman?

A. So far as I know.

461 Q. Have you ever seen otherwise?

A. No.

Q. Have you had occasion to see him with his children?

A. Yes, sir, on a very limited basis, I work all day long and he does too. The times that I have seen him have been over the weekend when he and Barbara and
462 their children and my wife and I and our children would be together. Can't say specifically when I have seen him.

Q. Was he attentive to the children?

A. Yes, sir.

Q. In other words, Mr. Young, you have a very high regard for both of them?

A. Yes.

Q. And you consider yourself a friend of theirs?

463 A. Yes.

Q. You have heard, of course, of the difficulties that came between them?

A. Yes, sir.

Q. And no doubt you have heard reports as to why?

A. Yes, sir.

Q. And you have at this time a high regard and affection for Mr. Aubrey Ford?

464 A. The same affection that I have always had.

Witness down.

By the Court: Before going on to the next witness, both parties are good people, good family, good parents.

I am going to exclude any further testimony as to their faithfulness as parents.

You are not claiming she is a bad mother, except for certain specific reasons. They are good parents, love their children. If anybody is attempting to make an attack, he can do it. 465

By Mr. Carter: They allege among other things that she has been guilty of adulterous conduct, but allege other things which we attack.

By Mr. Walker: Your Honor, I think the answer was more specific in its detail than the complaint was.

By Mr. Carter: We have a witness we think should testify. 466

By Mr. Walker: Don't think that there is any question there are people here who will testify that Mrs. Ford is a good person, and in their observation a good parent.

By the Court: What witnesses?

A. Frances Lineberger has known her all her life; Dr. Will Fewell has known her, but not so well, also her grandfather is present to testify. 467

By Mr. Carter: Some have seen the children ever since their marriage; some can testify as to her care and conduct continuously throughout their married life, not just since she has been in Greenville.

By Mr. Walker: The plaintiff has alleged the defendant is an unfit person to have the custody of the children.

By Mr. Carter: The only attack we make on him is the testimony you have just heard. 468

DR. R. FINLEY GAYLE, III, plaintiff's witness, having been sworn, testified:

Direct Examination By Mr. Carter:

Q. Dr. Gayle, what is your profession?

A. Physician, specializing in psychiatry. Attended the Medical College of Virginia, from which I graduated—

By Mr. Walker: We will admit he is qualified as a doctor.

By Mr. Carter: We are qualifying him as an expert.

469 *By Mr. Walker*: In what?

By Mr. Carter: Psychiatry.

By Mr. Walker: We will admit he is qualified as a psychiatrist, but not as to what he may testify.

By Mr. Carter: Are you related to either of the parties to this action?

A. Mrs. Ford is my step-sister.

Q. Mrs. Ford is your step-sister?

470 A. And my sister-in-law.

Q. How long have you been acquainted with the defendant, Aubrey Ford?

A. I have known Aubrey, I have known Mr. Ford, I guess, since '45 or '46. Have not known him well until recently when I was associated with Mr. Ford during his courtship.

Q. Had occasion to see him frequently, or infre-
471 quently, during the last years?

A. More frequently during their courtship and just after they married, when they were in the vicinity of Richmond.

Q. Have occasion to see them in their home during this period?

A. Yes.

472 Q. In Richmond?

A. Yes.

Q. During this period, did you see them professionally?

A. Yes.

Q. Do you recall approximately when this professional consultation took place?

A. In the early part of 1957.

Q. Where?

A. In their home. 473

Q. At whose request did you see Mr. and Mrs. Ford?

A. I saw Mr. and Mrs. Ford at Mrs. Ford's request and at my family's request.

Q. Did you do it voluntarily, or reluctantly?

A. Well, I did not want to do this; I felt that perhaps someone else who did not know them quite so well, as is usually the case in any professional case, that this 474 might be the better thing for them to do. However, as I understand it, there was some objection to Mrs. Ford's seeing someone else, and I wanted to see them because I felt that Mrs. Ford needed some help, and because I thought something of them personally I would be willing to forego my reluctance to do this.

Q. Did you place any conditions on your consultation? 475

A. Yes, I told her —

By Mr. Walker: We object to what he told her.

By the Court: He is laying down the principle on which he would see her

A. I told Mrs. Ford that I would not see her unless her husband knew about it, and would prefer to see him also. 476

Q. Did you see them together or separately?

A. Separately.

Q. Which did you see first?

A. As I remember, I saw Mrs. Ford first.

Q. What was the result of these observations?

By Mr. Walker: Object to the question's form.

The Court: It is rather general.

By Mr. Carter: Wish to know his conclusions.

Q. What general recommendations did you make to each of them?

477 *By Mr. Walker*: This is an action for the custody of the children, not a divorce action, and as I recall, the plaintiff is not seeking support, and this would relate only to the original separation.

The Court: Would like to know if he has any recommendations as to what I should do with the children, if he has any basis.

478 *By Mr. Carter*: Dr. Gayle consulted her husband, and I think it is important to get the true picture.

By the Court: Let him tell me what he found, and if there was any excuse for committing the act.

By Mr. Carter: What general recommendations did you make to each of them?

A. Well, in the beginning, as in any acute difficulty between people, I was making an attempt to find things
479 at hand which each person might do to calm the water, and make some sort of beginning. I felt that Mrs. Ford should strive to do more of the little things that she felt her husband had been critical of her about, that she should try to show as much consideration and warmness to him as she could, endeavor to be more careful with her responses to him, and try not to respond in anger, but to be calm and try to discuss things with her husband.
480 Mr. Ford and I – I discussed this matter of her frigidity with Mr. Ford, there was no lack in their physical relationship, but some loss in their emotional relationship. I felt that the fact that she was becoming frigid was making him more anxious. I felt that was lending motivation to his being more rigid with her in an effort to control the situation. This led to nothing but more of the same –

the more he tried to control and direct, the worse things became. Mr. Ford was doing the best he could, not being critical of him, doing the best he knew how, I feel that. I spoke to him about the fact that he should be less rigid with his wife, less critical. Mrs. Ford, his wife, felt that 481
because of his hypercriticism she was losing her identity as a woman and as a wife, because she felt that, justified or not, her husband's criticism of her gave weight to her own feelings of insecurity, and we talked about what he could do to help gain some effective control of the immediate situation. My impression at that time was that Mr. Ford is a very industrious, meticulous person, whose 482
meticulousness, in all probability went over into his relationship with his wife. His efforts to keep things in order and control things got in the way of his drawing close to his wife and understanding of her.

I tried, as I remember we talked about the frigidity situation and how he might help this along, the thinking being that he might be less rigid with her. These are some of the things that come to mind. She felt herself unac- 483
cepted by him and his friends, whether justifiably or not I do not know, but these reactions she got as a person.

Aubrey is a very proud person, and he wanted his family and his wife to be as he wanted them to be. Maybe they were not able to be as he wanted them to be, no criticism of him; I am talking about two people, how they felt toward each other.

Q. Your observation of Aubrey Ford since he has 484
been a member of the family, as well as your professional contact with him, have you been able to form a professional opinion on his connection with his wife, and his wife's deviation in 1959?

Mr. Walker objected; objection noted.

A. It makes sense to me in the particular sense

that what this young woman's feelings were at this time, and prior to this time – she had gotten the feeling that she was being more anxious about herself, her capabilities, how effective she was as a mother and wife, and
485 her feeling was that she was an inept wife, not only in the physical relationship, but in many ways. That Aubrey's way of trying to change it added more fuel to the fire, and this episode between the other person and Mrs. Ford was an attempt to gain some sort of reassurance for herself. Not making an excuse, giving some explanation behind the motivation. Not a physical thing,
486 some feeling of warmth and tenderness involved, disappeared quickly; this was a part. This is my feeling in terms of an explanation of how these things are related one to another.

Q. Have you had occasion to see the parties, either individually or with the children?

By Mr. Walker: For the record, I would like to assert that I assume my objection carried with respect to
487 the whole testimony?

The Court: May argue the case any time.

A. I have seen them individually and together with the children, have seen Mr. Ford, but not as often as her.

Q. Where did you see them?

A. At my home, her mother's home, and in their own home.

Q. As you see her with the children individually,
488 have you an opinion whether Mrs. Ford has been and is a good and proper mother for these children?

A. Think she is.

Q. What about Mr. Ford?

A. Have no reason to believe Mr. Ford is not a good father.

Q. In view of the testimony that she committed

adultery in 1959 with one man over six weeks, coupling that with your professional knowledge and observation of Mrs. Ford and the children, do you have an opinion as to what bearing the summer of 1959 would have on her relations with the children? 489

By Mr. Walker: We object, Your Honor. The function of an expert witness is not to decide on what a judge should decide – when it reaches a conclusion, that is going too far.

The Court: The Supreme Court has pushed the door a little ajar on that issue. Let him testify as to whether or not this episode affects the moral fibre of the situation in such a way as to make a change that would be injurious for the children. 490

A. My feeling is that it would not detract in any way from her being a good mother; it will lend support to her being a better mother. This young woman has had a very meaningful, although disastrous, experience, I think. And this has given her something which she has regretted from the very moment it happened, but nevertheless it has given her a greater security within herself as to what her potential is as a woman. It is behind her, past her, could make her a better mother. 491

Q. Do you have a professional opinion as to what would be for the best interest of the children in connection with the custody matter?

The defense objected; the objection was sustained.

492

Cross Examination By Mr. Walker:

Q. You are her step-brother, and she is your sister-in-law?

A. Yes, sir.

Q. Married her full blood sister?

A. Yes, sir.

Q. And your father married her mother, is that it?

A. Yes, sir.

Q. That made you the step-brother?

A. Yes, sir.

Q. Now, you practice professionally in Richmond?

A. Yes, sir.

493 Q. And you were there and consulted at the time of the first rift, I suppose?

A. I don't know that it was the first rift, there was something.

Q. You consulted with her in Richmond subsequent to this affair that she had with one James Sloan?

A. No, all prior to that.

Q. Did you not consult with her any between August and October, 1959?

494 A. Yes, I saw her and talked with her a little bit.

Q. And you are acquainted with the attorney who represented her in Richmond?

A. Who are you speaking of?

Q. Alex Parker.

A. Yes.

Q. Did you not talk with Mr. Parker?

495 A. Yes, sir.

Q. Prior to any agreement and disposition of the case that was made in Richmond?

A. I am not certain.

By the Court: Did you not know about the litigation in Richmond?

A. Yes, but to say that I talked to Mr. Parker before

496 this or not, am not certain.

By Mr. Walker: Well, you don't remember whether you talked to Mr. Parker prior to this agreement being reached for the custody of the children?

A. I am sure I must have.

Q. Did you not tell him substantially what you have told this court today?

A. I don't remember exactly what I told Mr. Parker, sir; in general terms, I am sure some of this must have come out. 497

Q. Generally speaking you would say you had told him in substance what you told this court today?

A. Yes, sir, maybe so.

Q. Did you talk with the attorney in Richmond as her brother or as a psychiatrist?

A. I can understand this point and I must state right here that it was only with the consideration of these two things that I went into this, only that I loved her that I did it; I was reluctant to do this, only because I thought a lot of the family that I did. 498

Q. How long have you been practicing?

A. Since 1953.

Q. When did you pass the psychiatric board examinations?

A. I take those in March. 499

Q. Have not passed them?

A. No, sir.

Q. You are practicing in what respect?

A. Practicing psychiatry.

Q. But have not taken the examinations?

A. It is not necessary to take those examinations.

Q. Have you taken them?

A. Yes. 500

Q. Failed them?

A. Yes.

Q. How many times have you failed them?

A. Twice.

Q. Preparing to take it a third time?

A. Yes.

Q. Think they are of some significance?

A. Think they are of some significance; a great many people have failed to pass them, and are practicing successfully. The past president of the Psychiatric Board has never passed them.

501 *By Mr. Carter*: Your Honor, he has admitted that this man is qualified.

The Court: They have permitted this man to practice.

By Mr. Walker: Were you able to disassociate yourself from the relationship factor that you were confronted with as to Mrs. Ford?

A. Well, I don't think I was able to completely 502 disassociate myself of the association with either one.

Q. Not able to be completely professional?

A. There was a quality in some knowledge of the family situation which was of advantage; if there was any disadvantage, which you imply, it was offset by the other factor.

Q. What other factor?

A. The family relationship.

503 Q. Think you were ever able to be completely objective in the problem?

A. Don't know whether I am ever able to be fully objective. Tried to be as objective as I could.

Q. Your Honor, I would like to reserve my rights on this next question.

The Court: Agreed.

504 Q. Did I understand you to say that affair she had with this person – with this person over some six or seven weeks – will result in making her a better mother?

A. Yes, sir.

Q. And that is your opinion?

A. Yes, sir.

Witness down.

After some discussion between the Court and the Plaintiff's counsel, no further witnesses were allowed to testify along this line.

The Plaintiff was recalled to the stand.

Re-Direct Examination By Mr. Carter:

Q. Barbara, you testified this morning under cross-examination that you did sleep occasionally after taking the children to school?

A. Yes, sir.

Q. You have an incipient ulcer?

A. Yes, sir.

Q. How long have you had that ulcer?

A. I had had that before we were married; it started when I was in college.

Q. Was your husband aware of the condition?

A. Yes.

Q. Have you consulted a physician on occasions about it?

A. Two physicians.

Q. Had you and your husband taken vacations together?

A. Yes, sir.

Q. How often?

A. When he could get off, went to Myrtle Beach.

Q. Be more specific. When did you go to Myrtle Beach? How long since you had had a vacation together?

A. We went to Myrtle Beach in May, for about a week.

Q. Of that year?

A. Yes.

Q. One other question: As a result of what your child told you about your husband's conduct, did you make a record?

A. Dr. Will Fewell suggested it.

Q. Did you have it made?

A. Made without his knowledge.

Re-Cross Examination By Mr. Walker:

509 Q. And I believe this testimony to you by the child was October, 1959?

A. Think it was October, or early November.

Q. And that was prior to the time that you entered into this agreement in Richmond by and with the advice of your attorney?

A. No, sir.

Q. It was not?

510 A. This was the day that Dorothy left New York to go back to Germany, and she did not leave until the agreement was signed, or the agreement was made.

Q. And this Dorothy you refer to is the same person in whom you confided about your adultery, and whom you had with you at Gloucester during that period of time?

A. Yes, sir.

511 Q. And you confided in her as a close friend?

A. She was a close friend.

Q. And had lived in your home for a period of a year and a half?

A. Yes, a little over a year — from April to July.

Q. And you did not make any mention of this in Richmond in connection with the proceedings that had taken place in the court there in Richmond?

513 A. Did not know it; he told me the day she left New York on a boat to go back to Germany.

Q. You questioned him?

A. I did not ask him — he told me.

Q. You made no mention of this to anyone at that time?

A. Yes, I told my sister — my mother — told my brother.

Q. The gentleman who has just testified?

A. Yes.

Q. When did you tell him?

A. I suppose after he told me.

Q. You don't remember when? 513

A. No — October — told Alex Parker too.

Q. When?

A. After he told me — don't know when.

Q. You stayed in Richmond for how long?

A. I left Richmond on the 27th of December.

Q. And then it would have been approximately almost two months that you lived in Richmond after this girl went to Germany? 514

A. Aubrey will know when she went to Germany; I don't know.

Q. You don't know?

A. No, don't know when she went to Germany; shortly after that.

Q. Did this girl live with Mrs. Ford from the time of your separation — of the separation of your husband, 515 until the time she went back to Germany?

A. Yes, sir.

Q. Where?

A. In Richmond, at Mrs. Ford's.

Q. And you don't recall the time that she went to New York to return to her own home?

A. Almost immediately after the agreement was signed, and little Aubrey told me the day she was to sail 516 from New York.

At this point Mr. Walker stated that he had another phase of his cross-examination he would like to go into, which would take an additional fifteen minutes or

so, asked if he would have the right to examine the witness later.

By Mr. Carter: Would like to offer, for the purpose of identification — I have a picture of Dorothy. Like to offer it.

517 Agreed — the picture was introduced in evidence as Exhibit 6.

Q. Will ask you whether or not you told your husband what little Aubrey told you?

A. Yes, sir, I did.

Q. When did you tell him that?

A. I told him in his living room, in the living room
518 of his house, shortly before he took the children back, in December.

Q. Told him about it?

A. Told him what little Aubrey told me.

Q. What was his reply?

A. He said, "What could make a child say a thing like that?" And I said I wondered the same thing, and came to the conclusion the only thing to say a thing like
519 that would be the truth.

Mr. Walker asked this to be repeated. Witness repeated her answer, and added: And he said, "Well, it isn't true." And I said, "Well, you will have to deny it, and between you and little Aubrey, would be more apt to believe little Aubrey."

Q. When was that?

A. In December, shortly before the children went
520 back to Sanford.

Q. And his reply was, "What made the child say a thing like that?"

A. Yes.

Mr. Walker asked for the photograph, and asked:

Q. Was this taken at Gloucester?

A. No, in Sanford, in front of the home Mr. Ford now lives in, the one we lived in in Sanford.

Q. Taken by you?

A. By me in July.

521 Plaintiff rested.

Hearing reconvened Tuesday, October 25, 1960, at 9:00 A.M.

Appearances as noted previous day.

Agreed that the plaintiff has concluded its opening case.

MR. HERMAN AUBREY FORD, Defendant, having been 522 duly sworn, testified:

Direct Examination By Mr. Davenport:

Q. Aubrey, how have you been known, as Herman A. Ford, or H. Aubrey Ford?

A. H. Aubrey Ford.

Q. Named after your father, of course?

A. Yes, sir.

523 Q. And the oldest child is named after you?

A. Yes, sir.

Q. Where were you born, and where did you grow up?

A. Richmond, Virginia.

Q. And how long had you lived there?

A. 1927-1950.

Q. Your father was in the tobacco business in Rich- 524 mond?

A. With Larus on Brothers.

By the Court: What is your work?

A. Was supervising, shipping, bookkeeping, supervising, all the buyer end.

Q. With the company?

A. Yes, sir.
Q. Manufacture, buy and resell?
A. Yes.
Q. Handled upon the market?
A. Yes.
Q. What lines?
525 A. Bright and Burley.

By Mr. Davenport: Laruson Brothers that your father worked for is a Richmond concern?

A. Yes, sir, manufacturers.
Q. Cigarette and pipe tobacco?
A. Yes, sir.
Q. Edgeworth is their well-known brand?
526 A. Yes, sir.
Q. Your mother come from Richmond?
A. Not originally, Sussex County.
Q. Waverly?
A. No, beyond Waverly, lived there most of her life.
Q. Your mother was originally a Gray?
A. Yes, sir.
527 Q. Of the Gray Lumber Company?
A. Yes, sir.
Q. You were born in 1927 in Richmond, Virginia?
A. Yes, sir.
Q. Went to school in Richmond?
A. Yes, sir.
Q. What college?
528 A. University of Richmond.
Q. Your father went there?
A. Yes, sir.
Q. You married Barbara Dale in 1952?
A. Yes, sir.
Q. What day?

A. March 15.

Q. Now, when you were first married, where did you and Barbara live?

A. We were traveling all the tobacco markets, various places.

Q. Almost constantly?

A. Yes, sir.

Q. What company?

A. Austin Company, Greeneville, Tennessee.

Q. Leaf tobacco?

A. Yes, sir.

Q. And you and Barbara were traveling pretty extensively before little Aubrey was born, and afterwards?

A. Yes, sir.

Q. From Virginia, Tennessee, Maryland, back to Virginia; anywhere else?

A. In North Carolina for some time, and very seldom in Georgia.

Q. Following the tobacco market?

A. Contacting buyers.

Q. And then when was Aubrey born? Seven and a half years ago?

A. 1953.

Q. June, 1953?

A. Yes, sir.

Q. And Bonnie was born two years later?

A. '55, March.

Q. A little girl?

A. Yes, sir.

Q. The only girl?

A. Yes, sir.

Q. And then Jay, the youngest boy?

A. James L.

Q. Born when?

A. On March 21, 1957.

Q. Where was he born?

A. In Richmond.

Q. In 1957?

A. Yes, sir.

Q. And then, when did you and Barbara go to
533 Germany?

A. May have been April, but I think it was May, 1957.

Q. But just within six weeks to two months after Jay was born?

A. Yes, sir.

Q. Where were you living or stationed most of the
534 time?

A. Hamburg, all of the time.

Q. What company were you with?

A. The same as now; Tobacco Merchants Corporation of New York City.

Q. Were your superiors in New York City, or in Sanford, North Carolina?

A. Actually the same, the corporation is a New York
535 City concern.

Q. Some reference was made I think yesterday to the death of your father, that had occurred shortly before you went to Germany?

A. September, 1956.

Q. Died of what?

A. Cancer.

Q. Had he been sick some time?

536 A. Yes, sir, since March.

Q. Now, when you were in Hamburg, what was your work over there, primarily?

A. The majority of the work was customer contact in Hamburg itself, and we had an affiliate office there,

and the majority of the work was going to the office daily.

Q. At that time, your connection with the work had switched from buying to selling?

537 A. Definitely, yes, sir.

Q. When did you come back from Germany?

A. November, 1957.

Q. Why did you come?

A. Because a colleague of mine in the leaf end of the tobacco firm was taken very sick, and later died of cancer.

Q. A colleague on the same level with you?

538 A. Yes, sir, in the leaf end.

Q. Who was that?

A. J. B. Long.

Q. Recalled you because of his illness and brought you back to the states?

A. Yes, sir.

Q. When you came back in November, 1957, where did you first go?

539 A. Richmond.

Q. Where did you live in Richmond?

A. My family stayed in Richmond because I had to go immediately to Kentucky and Tennessee, and they stayed in Richmond, I believe at our mother's.

Q. With Mrs. Gayle – and your mother?

A. Yes, sir.

Q. Actually, your mother and Mrs. Gayle lived 540 very close to each other, did they not?

A. Yes, sir.

Q. Went to Tennessee and Kentucky, is that the Burley market?

A. Yes, sir.

Q. How long does it last?

A. Four or five weeks.

Q. For what period?

A. Varies – just before or just after Thanksgiving.

Q. When does it end?

541 A. Approximately the 20th of December.

Q. Remember what dates were involved that year?

A. Yes, sir, the market did not open until after Thanksgiving, and ended the 20th or 21st of December.

Q. When did you go?

A. The day before the market opened.

Q. You went there immediately?

542 A. Yes, sir, and came home as soon as they were over.

Q. After Christmas of that year, 1957, or early January, 1958, did you move from Richmond?

A. Yes, sir.

Q. Where did you go?

A. To Sanford, North Carolina.

543 Q. Take your family with you?

A. Yes, sir.

Q. Where did you live?

A. In a small house on Bracken Street.

Q. How long did you live in that house?

A. I believe we lived there until April or May, think that is correct.

Q. Of 1958?

544 A. Yes, sir.

Q. And where did you move?

A. To a section called Carpenter Heights, to a new house; did not own, rented, in which I still live.

Q. The house where you live now?

A. Yes, sir.

Q. When you went to Sanford, what was the nature of your work then?

A. The main part was supervising in the leaf end of the tobacco company.

Q. Buying and selling?

A. Only buying, but I was still engaged, only when I went to Europe, in selling also. 545

Q. When you first went back, you went back into the buying end of it?

A. Yes, sir.

Q. Now, when you moved to Bracken Street, that was May, 1958?

A. That is when we moved from Bracken Street.

Q. To the other section?

A. Yes, sir. 546

Q. Did you make any plans with reference to acquiring your own home?

A. Made plans, saw an architect, the plans had been made at the time of our separation, and the bids had been taken by the contractor and the estimate given.

Q. Had you bought the lot?

A. Yes, sir. 547

Q. When did you buy that lot?

A. Approximately in June or July, 1959.

Q. Which would have been a little over a year ago?

A. Yes, sir.

Q. And which would have been also a month before your separation?

A. Or a little more than that – may have been June, 548 not sure.

Q. How extensive a house was that that you were planning?

A. We were attempting to make a house that would cost $40,000, but the original sketch was larger.

Q. Was the idea then that it would be, as far as you could tell at that time, a permanent home?

A. Yes, sir.

Q. Still renting the house you were living in, and are living there today?

A. Yes, sir.

549 Q. Have you, or are you, building on that lot?

A. Building on it now.

Q. Is the house nearly constructed?

A. Yes, sir, almost constructed.

Q. Now, Aubrey, yesterday you heard your son, what he had to say, and heard what Barbara had to say, and you heard Barbara say she told you she had
550 something to discuss with you. Do you recall when it was little Aubrey said that?

A. Not absolutely.

Q. Can you state, as accurately as possible, when it was?

A. During the time Barbara and I, prior to the agreement last year, were having discussions frequently, and this was on a telephone conversation that she first
551 brought it up.

By the Court: Did she tell you she had something your son had told her?

A. The way she put it on the telephone was, "We have something on you about you and Dorothy."

Q. Just before the agreement was reached?

A. Yes, sir.

Q. How long?

552 A. Approximately ten days; The way I know it was before the agreement, in the conversation she said, "We have something on you; we know about you and Dorothy, but we won't use it in court." I asked her what she meant, and in that conversation she would not tell me what she meant.

By Mr. Davenport: When did she tell you?

A. Face to face, in one of these conversations. I asked her several times, and she finally told me that little Aubrey had made that statement to her.

By the Court: Was that over the telephone? 553

A. No, sir, face to face.

Q. Before or after?

A. Judge, I am not sure.

By Mr. Davenport: When she did tell you of the nature of the conversation, she told you that was what she had reference to in the telephone conversation?

A. She said that in answer to my question: "We have something we are not going to use in court." 554

Q. You and Barbara had several discussions face to face, during October, prior to this agreement?

A. Yes, sir.

Q. At one time they were almost every day, or every evening, or every other evening, face to face or by telephone?

A. Yes, sir. 555

Q. And – I don't know whether Mr. Carter will want you to answer this, because I don't know the answer until after I have asked it – was that or not with the advice and encouragement of both the lawyers for Mrs. Ford and you?

By Mr. Carter: We have no objection to going into it fully.

The Judge ruled that the door had not been opened 556 by this question as to the conferences.

Mr. Carter reserved his right to go fully into any answer witness gave.

Agreed by all concerned; Mr. Ford then gave his answer:

A. Yes, sir.

Q. Now, let me ask you this: Did at any time you ever lie on your bed, or any other bed, or couch, with Dorothy?

A. No, sir.

Q. And you so told Barbara when she told you what she was talking about?

557 A. Yes, sir.

Q. Now, Aubrey, after the agreement was reached when did you go to Sanford with the two youngest children?

A. Approximately two weeks after the agreement, I think.

Q. Which would have been about the middle of

553 November?

A. Yes, sir.

Q. Where did little Aubrey stay?

A. With Barbara at her mother's house.

Q. For how long did he stay?

A. Until after Christmas, the 27th of December.

Q. He was in school in Richmond that fall, was he not?

559 A. Yes, sir.

(Mr. Carter asked for that date to be repeated, which Mr. Ford did.)

Q. And who went to Sanford with you?

A. In December?

Q. When you moved the two younger children?

A. My mother.

Q. Did the children spend the Christmas holidays

560 together that year?

A. Yes, sir.

Q. Which would have been last Christmas?

A. Yes, sir.

Q. Where did they stay?

A. They stayed between Mrs. Gayle's house and my mother's house in Richmond.

Q. In Richmond?

A. Yes, sir.

Q. And then you went back to Sanford on December 27? 561

A. I am pretty sure that is the date.

Q. And when you went back to Sanford, did all three children go with you?

A. Yes, sir.

Q. Did you or did you not at that time, after that, take Jay or send Jay with someone to his mother in Greenville? 562

A. On the 20th of January, and I believe that was when Barbara got back from New Orleans, and I believe I took him myself.

Q. Jay stayed with his mother how long?

A. With the exception of one week, I think until very near the end of May.

Q. And the other two children were in Sanford, were they not, in school? 563

A. One in regular school; one in kindergarten.

Q. Little Aubrey in regular school, and Bonnie in Kindergarten?

A. Yes, sir.

Q. Whose kindergarten?

A. Mrs. Perry's.

Q. Who was living in the house with you from January until May? 564

A. My mother.

Q. Did you have a servant?

A. Yes, sir.

Q. And did you then, after school was over, did you take the children and your mother on a vacation somewhere?

A. Yes, sir.
Q. Where did you go?
A. Myrtle Beach.
Q. How long were you there?
A. Two weeks, almost two weeks.
565 Q. And about what date in June?
A. Until the 16th of June, or the 17th.
Q. And after you left Myrtle Beach, where did you go with the children?
A. Back to Sanford.
Q. Did your mother go back with you?
A. Yes, sir — no, Mother went back to Richmond prior to my leaving Myrtle Beach, and my sister and her
566 children were with me.
Q. After that, did you take the children to Greenville to be with their mother?
A. On June 20.
Q. Did you bring them yourself?
A. No, sir; I believe on that occasion my mother brought them.
Q. Brought them down here; they were with her for
567 the rest of the summer, until shortly before school, correct?
A. Yes, sir.
Q. During the winter and spring months while you were at Sanford, did the children see their mother?
A. Yes, sir, on two occasions I brought them down here for extended weekends with her.
Q. After the children were brought here by your
568 mother to be with Barbara, did you see the children?
A. Yes, sir, went to visit them around the middle of July.
Q. Did you see them again after that?
A. Not until I was served.

Q. Served with what?

A. The amended complaint.

Q. In this case?

A. Yes, sir.

Q. When did – I think there has been some testimony about your mother's death – I believe it was August 4? 569

A. That is correct, sir.

Q. Died in Richmond?

A. Yes, sir.

Q. Were you in Richmond at the time?

A. No, sir.

Q. Where were you?

A. On the way back to Sanford from Georgia. 570

Q. And of course, you came to Richmond as soon as you heard about your mother's death?

A. Yes, sir.

Q. Do you remember when you came to Greenville, and were served?

A. The Wednesday following the 4th of August; I think the 10th of August. Wednesday, anyhow.

Q. Had you advised Barbara that you were coming? 571

A. Yes, sir.

Q. How did that take place?

A. Believe it was Tuesday before I came, called Barbara. I wanted to come to see the children; asked her if she had told them about their grandmother. She had told Aubrey, but was leaving the other two to me. I asked her if I could take them to the motel for one night, to 572 spend the night with me, and she objected a little bit, would not let me take them to the motel alone for the night when I was there in July, but after a while she agreed that I was to come and pick the children up at

11 o'clock from the colored girl she had there, and take them to the motel and return them the next day.

Q. That was the telephone conversation?

A. Yes, sir.

Q. On the day before you came?

A. I think it was the day before.

573 Q. When did you get to Greenville on that Wednesday you refer to?

A. Around 10:15 or 10:30, I arrived in Greenville and went straight to the apartment.

Q. From where did you come?

A. Richmond.

Q. How?

574 A. By air.

Q. Went to whose apartment?

A. Barbara's apartment.

Q. Tell the court what took place when you arrived.

A. Well, I was rather upset –

Objection by Mr. Carter.

Court ruled that was responsive to the question.

575 A. As I walked up the rear steps expecting to see the children, a sheriff's deputy, or a man, was out there, and asked me if I were H. A. Ford, or Herman Aubrey Ford, and when I said yes, said, "I have to give you these," and he said, "I am just doing my job."

Q. What else happened?

A. I turned to leave, and Mr. J. C. Keys came out and asked me to come in and I said I didn't know what 576 I was supposed to do, and he said it was all right, and I went in and asked to call you . . . could not get you, while they got the children I talked to Mr. Denny.

Q. Who is he?

A. Partner in your firm.

By Mr. Carter: We submit that we had a right to serve him in the apartment.

The Court ruled out any reference to the conversation with Mr. Denny.

Q. What conversation did you have with Barbara at that time?

577

A. Several times she said she was sorry, and think I said hardly anything.

The Court: Sorry for what? Having to have you served?

A. I assume that is what she meant, yes, sir. After talking with Mr. Denny, I asked her if I could see the children for about an hour, and she and Mr. Keys drove off to get the children, and Barbara came back with the children and the nurse, and the children stayed with me at the apartment about an hour or more.

578

By Mr. Davenport: And you left?

A. Yes, sir.

Q. Where did you go?

A. Back to Richmond.

Q. To see me?

579

A. Yes, sir.

Q. Now, did you ever notice that the papers that were served on you were called "Amended Complaint?"

A. Yes, sir.

Q. When you were served that day, when you arrived at Barbara's apartment, did you know anything about a complaint being outstanding?

A. No.

580

Q. Had you ever heard of the original complaint?

A. Not when I was served, no, sir.

Q. You have subsequently learned about an original complaint?

A. Yes, sir.

Q. And have seen a copy of it?

A. Yes; sir.

By Mr. Carter: We tried to have him served in Georgia and also in North Carolina, at a time before his mother's death.

581 *By Mr. Walker*: We wish to state into the record the affidavit of one D. F. Holder who is the Sheriff of Lee County, North Carolina, in which Sanford is located, who states that he received from Mr. Rex L. Carter on July 29, 1960, for service of process and that he was advised that Mr. Ford worked at the Sanford Tobacco Company, and this was processed through his office, and his records indicate no service was had on the defendant,
582 but was held until Mr. Ford returned, and that later, on August 3, Mr. Carter requested that the papers be returned, which was done.

Admitted in evidence as Exhibit 7.

Q. Now, Aubrey, the children are with you now in Sanford at the order of this court?

A. Yes, sir.

583 Q. Since your mother's death, what provision are you making for the care of the children?

A. Mrs. J. K. Perry, who had Bonnie in kindergarten last year, is living in the home with us and also we have a servant from 7:15 in the morning until 6 in the evening.

Q. Is Mrs. Perry a mother herself?

A. Yes, sir.

584 Q. How old is the lady?

A. Approximately fifty-two.

Q. Bonnie having been there, Barbara of course knows Mrs. Perry, does she not?

A. Yes, sir.

Q. And I believe there is an affidavit on file in this case from Mrs. Perry?

A. That is correct.

Q. Is this a permanent arrangement with Mrs. Perry, or a stop-gap? 585

A. It is permanent as far as I am concerned, and she says it is as far as she is concerned, and everything could not be more convenient.

Q. What is her attitude toward the children, as you have observed?

A. She adores them exceedingly.

Q. What is the children's attitude toward her? 586

A. It is the same.

Q. What is the nature of your work now? Have there been any changes in the nature of your work recently, as compared with what it has been in the past?

A. Yes, sir.

Q. Can you describe the nature of your work, and the demands upon your time, and requirements of traveling with reference to your present occupation? 587

A. I have thought it was necessary for me to be at home as much as possible, so therefore what times I have previously been away — a month in August, and a month in November, or the first of December, and any time in Europe — I have talked to my superiors and those times are completely out as long as I wish, and I am at home now.

By the Court: All the time or most of the time? 588

A. All the time.

By Mr. Davenport: What hours do you keep in the weekdays?

A. During the fall, October and November, approximately 7 or 7:30 until 5 or 5:30. During the rest of the

year my time now is actually set by myself, and I am away from the office as much as I want to be, and there will be little time I am away from home.

Q. Still with the same company?

A. Same two companies.

Q. Which two?

589 A. Sanford Tobacco, and Tobacco Merchants Corporation.

Q. Related in any way?

A. Yes, sir.

Q. A tobacco group — same ownership?

A. Indirectly, yes sir.

Q. Now, Aubrey, you heard Barbara's testimony
590 with reference to the time that you and Barbara came back to Richmond in August of last year; the purpose of that trip was to see Finley?

A. It was to see Finley, yes, sir; or her family. I had told Barbara it should be between her and her family, or between her family and us.

Q. Ever get a chance to talk that over?

A. No, sir.

591 Q. You heard Barbara testify as to that trip, I believe she said it was approximately the time you arrived in Richmond that you had told her you were going to divorce her and take the children; is that accurate?

A. No, sir; told her I would try to get the custody of the children — when we talked at first, no mention was made of a divorce.

Q. You also heard Barbara say that the next day,
592 in the conversation between the two of you, that you told her not to go back to Sanford, that she could not see the children, the sheriff would be waiting at the door?

A. Did not mention the sheriff, but did tell her the children were not at home.

Q. You also heard Barbara testify yesterday that in the fall of 1958, two years ago, and your first home in Sanford, that you were on the Kentucky tobacco market for three months in the fall. How long were you on the market? 593

A. Four and a half to five weeks.

Q. Beginning when?

A. Beginning right at Thanksgiving until approximately the 20th or the 21st of December.

Q. Did Barbara ever make any comment to you with reference to the man with whom she had had this affair, and with reference to liking him, or loving him, or what circumstances that would be? 594

A. Yes, sir.

Q. What was it as well as you recall that she said to you?

A. I said, "Barbara, you know what people in Richmond think of Sloan," and she said, "To know him is to love him," and she said it twice.

Cross-Examination By Mr. Carter: 595

Q. Mr. Ford, you say when these papers were served upon you here in Greenville, you immediately called your attorney in Richmond?

A. Yes, sir.

Q. And on your behalf your attorney prepared the answer to this complaint that your wife served on you?

A. Yes, sir. 596

Q. And you signed this answer and verified it?

A. Yes, sir.

Q. And in the allegation of your answer, you allege the plaintiff was guilty of gross misconduct during the time she resided with you as husband and wife, and such acts of gross misconduct included numerous acts of adultery during July and August, 1959.

What do you mean, that she was guilty of gross misconduct other than this?

By Mr. Walker: We object.

He has a right to cross examine the witness, but I think the court has ruled that our testimony was limited
597 to the adulterous affair over the period of time, and that their charge as to his misconduct was predicated upon the alleged incident mentioned by the child.

By the Court: In justice to you and to your client, I think I had better exclude that, and I have you limited to two issues.

By Mr. Walker: We are trying this case within the
598 confines of Your Honor's ruling, and that is the reason I took exception.

By Mr. Carter: But you do allege your wife is an unfit mother; is that correct?

A. Yes, sir.

Q. About what was she unfit when you allowed Jay to live with her for three months?

The Court: The three months – when?

599 A. After this agreement was entered into.

By Mr. Carter: He is alleging that she is an unfit mother.

The Court: Going to allow him to testify that she is an unfit mother because of the two months episode. He can testify why she is an unfit mother due to her conduct during July and August, and then allowed him
600 to stay with her in July and August.

By Mr. Walker: Then we will ask that she be recalled for cross examination in this same respect, because she has alleged that he is an unfit father, and she agreed to this agreement in Richmond whereby the children were given into his custody.

The Court: I will exclude the question.

By Mr. Carter: You will confirm the inconsistency of him allowing her to have the care and custody of the children for three months?

The Court: It would be in the record. I am going 601
to allow you to argue it. It seems to me that both of them have made their position untenable by the way they have conducted themselves. I am going to allow you to argue.

By Mr. Walker: We have no objection to his going into it, and would like to know, unless it is to be confined because of your Honor's ruling, whether he expects to 602
open it up, and if your Honor permits, we have no objection to opening it up.

The Court: I have you confined to the issues, you are going to stay within the issues.

By Mr. Carter: Mr. Ford, you testified on your direct examination about your work, and your traveling?

A. Yes, sir.

Q. Did you ascertain how many different places 603
you were in from the time you married until 1959?

A. She states here, you see, 26, I am not sure; if you count every little place we stayed in, it may be 26.

Q. Twenty-five or -six, from Greeneville, Tennessee to Europe?

A. Yes, sir.

Q. Immediately after your wife told you about this 604
affair with Sloan, you and she lived in the house together four days and nights?

A. Believe it was five.

Q. Did she mention that she wanted to discuss it with her family – correct?

A. Yes, the night prior to that. I must say first,

that most of what Barbara told me was solicited by me the night prior.

Q. The first time you heard about it was from Dorothy?

605 A. That is the first time I heard of it directly.

Q. She told you – you made her?

A. Yes, she told me.

Q. And you confronted your wife with it when she returned from Gloucester?

A. Yes.

Q. And she admitted it?

Q. And for the next five days you asked for details?

606 A. Well, she told me more than I asked.

Q. You asked for details, and she answered?

A. Yes.

Q. And you were on your way to Richmond to discuss it I presume?

A. Yes, sir, if she wanted to.

Q. You were on the way to her house?

607 A. Yes, sir.

Q. Did she want to?

A. At that time she didn't particularly want to, but since she had written Fin, her brother-in-law, I insisted that she should.

Q. And you were on your way?

A. Yes.

Q. Had already consulted a lawyer about your

608 rights?

A. Yes.

Q. Had not told your wife you had?

A. No.

Q. On your way to discuss it with the family?

A. Or some member of her family.

Q. And when you were in Richmond told her for the first time you were going to seek a divorce and get custody of the children?

A. No.

Q. What did you tell her? 609

A. That I was going to try to get custody of the children, because of the conversations in the house, and the conversation going up that day.

Q. You had already moved the children out of the house and located them in a motel?

A. No, sir, I had not.

Q. When did you do that?

A. The next day. 610

Q. The next day?

A. They spent that night with a friend and the maid.

Q. You had not told your wife that?

A. No, sir.

Q. Did not know they were spending the night away from home?

A. Not that night; called them when I got to Richmond. 611

Q. You did that sort of behind her back?

A. Just didn't tell her.

Q. So, when your wife called you, and told you the next day she was returning to Sanford?

A. Yes, she called me and I said I wanted to talk.

Q. To talk? 612

A. Wanted to talk with some member of the families.

Q. Who did you want? Your lawyer?

A. No, sir.

Q. Who?

A. Had discussed it with her prior to that, and

wanted one member of my family, and one member of hers.

Q. What was your purpose for wanting to discuss it?

613 A. Told her I wanted the custody of the children, and thought we should sit down and discuss it first.

Q. You had told her on the way to Richmond?

A. Yes.

Q. Had not told her before?

A. No, sir.

Q. How did you know?

614 A. We came to Richmond to discuss the marital problems.

Q. Nothing was discussed about custody as you came to Richmond?

A. As we came in.

Q. She said, "divorce," and you said "custody of the children."

A. Correct.

615 Q. And that night you made arrangements for the children to be moved out of the house?

A. Correct.

Q. And the next day you made arrangements for them to be moved to a motel in Fayetteville, North Carolina?

A. Yes, sir, after a discussion with Barbara's mother.

Q. Had not discussed it with Barbara?

616 A. No, sir.

Q. Did not discuss it with her or tell her where the children were until she told you she was going home?

A. Didn't tell them to go to Fayetteville until after that.

Q. Didn't tell Barbara to go to Fayetteville?

A. No, sir.

Q. What was your purpose in hiding the children?

A. Mrs. Gayle said she thought – I went over to her mother's house where I thought she was and asked her if she would not sit down and talk about this, and she said no, and she said she did not condone what Barbara had done. 617

(Objection –) Mr. Ford continued: And Barbara had taken off after the children.

Q. That was what she said?

A. That was what her intimation was.

Q. That is when you had the children moved to Fayetteville? 618

A. Yes.

Q. Had the maid?

A. And a man to drive her over.

Q. How long had the maid been in your family?

A. In this country since April, 1958. And then, of course, in Germany for a portion of the time we were there. 619

Q. How old was she?

A. Approximately twenty-two or three, I think.

Q. Was she a buxom girl, shapely girl, or what?

A. Large.

Q. Large in what respect?

A. Just a big large girl for that age.

Q. Was she shapely?

A. Well, she never had much appeal for me. 620

Q. I asked you whether she was shapely?

The Court: Answer the question.

A. Yes, I would say so.

Q. You heard your wife testify, and it is true that your wife came home on several occasions and discovered the maid rubbing your back, with your shirt off?

A. May I answer it fully?

The Court: If it is responsive.

A. That is true, but there were other times too.

Q. Were there other times when she was rubbing your back with your wife in the house?

621 A. Yes.

Q. But on several occasions she returned and found this?

A. Frankly, don't think it happened but once, not sure.

Q. Your wife discussed it with you angrily?

A. No, sir.

Q. Actually discussed it?

622 A. No, sir; actually, one time I asked her to do it, and she said, "Let Dorothy do it."

Q. What she said was, "Let Dorothy do it, she does it all the time anyway?"

A. No, sir.

Q. Were you concerned when your wife told you about what your son said?

A. Yes, sir.

623 Q. Did you ask your son about it?

A. Not at that time.

Q. When did you?

A. About a week ago.

Q. Discussed it with him about a week ago?

A. Yes, sir. I don't know that you would call it fully.

Q. Asked him all the details of it in preparation for the case today?

624 A. No, want me to tell you the conversation?

Q. Did you discuss it with Aubrey in preparation of the case?

A. No, not to prepare for the case.

Q. With what purpose did you discuss it?

A. Frankly, knowing the case was coming on, and the words in the two complaints, I think it is natural that I should wonder what might have been said, and this is the first time I had ever mentioned it to him. 625

Q. The reason you had not mentioned it before now was that you knew it was true?

A. The only way I knew he would make such a remark was for him to be pushed and argued into it.

Q. You do not believe that?

(Court ruled the question all right, after objection.)

Q. Really believe that? 626

A. Yes.

Q. Why did you discuss it with him, after you knew he had been subpoenaed as a witness in the case?

Mr. Walker objected: I submit that he would have the right to ask him, but insofar as the question is concerned —

Q. When did you learn the children were going 627 to be asked to testify in this case? When did you first learn that the children were going to be asked to come to court?

A. It was approximately — I would say — last Thursday I think, but after the talk in the afternoon with Mr. Walker.

Q. When did you discuss it with the child after 628 that? About the testimony?

A. It was after that.

Q. Now, when did you learn this? When did you discuss this?

A. Let me see, I am pretty sure it was afterward.

Q. When did you make your work change, change your schedule?

A. To the degree it is now, early in the summer. Prior to that, in January of this year, in December and January when I returned to Sanford.

Q. To what degree did you make it then?

A. That Europe was out.

629 Q. But you continued to travel the tobacco markets?

A. No, there was no tobacco market then.

Q. Traveled in Georgia this spring?

A. No, in August.

Q. In August of this summer?

A. Yes, sir.

Q. But you were still traveling in August?

630 A. The children were with me.

Q. But you were still traveling?

A. Yes.

Q. Have you been to any other tobacco markets this fall?

A. Yes, but I could live in Sanford every night.

Q. Did you travel any since your trip to Georgia?

A. Have not spent a night away from home.

631 Q. Where did you travel?

A. Fuquay, Varina, to Fayetteville, North Carolina.

Q. How far was that?

A. Thirty-seven miles, to Clarkton, North Carolina.

The Court ruled it unnecessary to go into these details.

632 *By Mr. Carter:* They spent a good bit of time on details.

Q. So your change to the degree that you testified only came about this summer?

A. No, sir, it actually came about as of January.

Q. But you do travel to the markets?

A. No, sir, not but to Georgia.

Q. Georgia your only market?

A. Yes, sir.

Q. Thought you testified you made the change in January, about traveling to Europe?

633 A. No markets then, between that time and the summer.

Q. Who is taking your place on that area?

A. So far, George Palmer and Mr. Bill Joyce, president of Sanford Tobacco Co.

Q. What are your responsibilities?

A. One of us has to be in Sanford most of the time, and I have been designated. Though Mr. Joyce as 634 president, and the stockholders it was decided that would be the case.

Q. You had been substituted?

A. Not as clearly as that, but I will not have to travel.

Q. What is your income?

A. Salary, $12,000 from the Tobacco Merchants Corporation and $5300 from Sanford Tobacco Company. 635

Q. Any other bonus?

A. Bonus from Tobacco Merchants Corporation.

Q. How much?

A. In the last two years it has been good, past year $10,000; but afraid this year will be zero.

Q. Each year?

A. Each year, I think it was the same in 1959; but this next year it will be zero. 636

Q. Any other income, dividends, stock?

A. Dividends and stock.

Q. Estimate your average per year?

A. Dividends last year, I think, Four or Five Hundred Dollars.

Q. How often are you at home at night, Mr. Ford?

A. I am home practically every night.

Q. And how long has that been going on?

A. Since we returned in December of last year.

Q. Since you returned this past year?

637 A. December of 1959.

Q. One night a week or two nights a week?

A. Practically every night.

Q. And I believe you testified you went to work around 7:30 in the morning, and got home 5:30 in the evening?

A. Only for September and October.

Q. And the rest of the time you set your own

638 hours?

A. Yes, sir.

Q. What time do you go and come?

A. Last spring usually I got home around 2:30, never later than 4:30 or 5. Leave home in the morning at 8:30.

Q. Pretty good working hours?

A. Yes, sir.

639 Q. And you made this arrangement with Mrs. Perry to take care of the children and live in the home?

A. Yes, sir.

Q. How long has that arrangement been in effect?

A. She came to live with me the same day I brought the two children back from Greenville.

By the Court: In June?

640 A. No, September.

Q. Been with you since that time?

A. Yes, sir.

Q. It has been ruled out, your Honor, but there was some testimony that your wife took some naps in the day time.

The Court: Ruled out – don't know why that was injected into it.

Re-Direct By Mr. Davenport:

Q. Aubrey, one of Mr. Carter's questions to you related to who took the children to Fayetteville last August. I think the answer indicated – I don't know whether your reply was the maid and driver – was your mother there? 641

A. No, sir; my mother and I drove from Richmond and spent the night with them in the motel.

Q. You joined them in Fayetteville?

A. Yes, sir.

Q. And the next morning you went back to Sanford to go to work? 642

A. Yes, sir.

Q. Mr. Carter asked if you were concerned when Barbara told you what Aubrey had told her; were you concerned?

A. Well, prior to that I thought the child was very upset, because he had heard things, I felt, around Barbara's house. 643

Q. Around whose?

A. Barbara's house, Barbara's mother's house. I knew he was very upset, he was going to a new school, and there had been a tremendous change, and I told Barbara at that time, when she made it definite this was what she was talking about, that I felt it was terrible – she and I both knew it wasn't true – I thought it was terrible he had been put through such a strain. 644

Q. You still say it was not true?

A. Yes, sir.

Q. Mr. Carter also asked you something with reference to your present salary and income. Barbara had,

also testified yesterday that you had told her you had made $12,000, but she subsequently found out that you made $19,500, I believe. Will you state what really she must have been referring to?

A. I believe this was my gross income in 1957, was
645 less than $12,000. That is everything. In 1958 it was just over $19,000.

Q. Now, included in the 1958 salary was the bonus, on the income I mean?

A. Yes, sir.

Q. Remember approximately what that bonus was?

A. The salary was $12,000 from Merchants, and about $2,000 from Sanford, about $4500 was the bonus.

646 Q. 1958 was the first year that you drew an additional salary from Sanford Tobacco Company?

A. Yes.

Q. So the 1957 tax returns in 1958 showed $12,000, the gross income?

A. Just less than that, yes, sir.

No further cross examination.

647 Witness down.

MR. HENRY VALENTINE, defense witness, having been sworn, testified:

Direct Examination By Mr. Walker:

Q. Mr. Valentine, where are you from?

A. Richmond, Virginia.

Q. Where were you born?

648 A. In Richmond.

Q. Lived there all your life?

A. Yes, sir.

Q. Go to school there, in and about Richmond?

A. Yes, sir, I did.

Q. What schools did you attend?

A. Attended the Albert Hill, and St. Christopher's, Woodberry, University of Virginia.

Q. Do you know Aubrey Ford?

A. Yes, sir.

Q. For how long? 649

A. Since I was around five or six or seven years old. Believe we were in kindergarten together, and when I was seven we moved very close to the Ford's residence; our residence was a couple of hundred yards away.

Q. Know Mrs. Ford?

A. Yes, sir.

Q. For how long have you known her?

A. I would say since the middle or early 1940's. 650

Q. Are you acquainted with or do you recall the time of Barbara and Aubrey's marriage?

A. Yes, 1952.

Q. Were you in the wedding?

A. Yes, sir, I was.

Q. Have you and Aubrey been close friends over the years? 651

A. I would say intimate friends over the years.

Q. What business are you in?

A. Brokerage, stocks and bonds.

Q. For how long?

A. Since 1952.

Q. Where – in Richmond?

A. Yes, and all in Richmond.

Q. Are you married? 652

A. Yes, sir.

Q. Have children?

A. Two.

Q. What ages?

A. One will be four in December, and the other two in February.

Q. Have you had occasion to observe Aubrey Ford and his children together?

A. Yes, sir, I have on numerous occasions.

By the Court: Mr. Walker, I understand you are going to undertake to prove the fitness of the father
653 of the children? They have not attacked it.

The Court then directed that it be stated on the record that stipulations have been made with respect to fitness of both parents.

Stipulated by both sides, and the court took notice, that they are both good parents, take good care of the children, except in the two areas mentioned, one with respect to the mother, and one with respect to alleged
654 conduct on the part of the father.

By Mr. Walker: The only contention of unfitness on the part of the plaintiff against the defendant is the alleged incident to which the little boy referred yesterday.

The Court: I don't know how far that goes; if you wish to examine any witness as to evidence on that
655 point, will allow it.

By Mr. Walker: Do you know the general reputation for truth and veracity of the defendant in this case, Aubrey Ford?

A. Yes, I would say it is the very highest among his contemporaries, old people and young people. Don't know anyone who does not share that view.

Q. Would you believe the word of Aubrey Ford
656 under any circumstances with respect to whether or not he was telling the truth?

A. Yes, sir, without hesitation.

Q. In your opinion is there any instance, or can there be any instance in your opinion of any circumstances under which —?

By Mr. Carter: We object.

The Court: Let him complete the question

Q. In your opinion, with respect to the reputation of Aubrey Ford for truth and veracity, could there be any circumstance or circumstances under which Aubrey Ford would not tell the truth and the whole truth?

By Mr. Carter: We object.

The Court: Let him answer the question.

A. No, sir, don't think there is any situation in which he would not tell the truth.

Cross Examination By Mr. Carter:

Q. Do you know the reputation of Barbara Ford for truth and veracity in the community?

A. Yes, sir, I think so, not as well as I would know Aubrey's.

Q. You have been more intimate with Aubrey than with Barbara?

A. Yes, sir.

Q. What is her reputation for truth and veracity in the community?

A. Fine, so far as I know.

Q. Excellent, as far as you know?

A. Yes, sir.

Q. Knowing her reputation as far as you know for truth and veracity, can you comprehend any situation in which she would not tell the truth?

A. I don't really feel qualified to answer that.

Q. You felt qualified so far as Mr. Ford was concerned.

A. In other words, you are saying, is there any situation in which —

Q. You just testified that there was no situation

you could conceive of that Aubrey Ford would not tell the truth.

A. Yes, sir.

Q. Is there any situation that you can conceive of that Barbara would not tell the truth?

A. To my knowledge, no.

661 Witness down.

W. LANGDON TRIGG, defense witness, having been duly sworn, testified:

Direct Examination By Mr. Walker:

Q. Mr. Trigg, where do you live?

A. 807 St. Christopher's Road, Richmond, Virginia.

662 Q. How long have you lived in Richmond?

A. All my life, sir.

Q. Do you know Aubrey Ford?

A. Yes, sir, I do.

Q. For how long?

A. I met Aubrey when he came to St. Christopher's school in the fall of 1939, I having been there since 1933.

Q. Did you know him well through the years sub-
663 sequent to the time of meeting him? Were you closely acquainted?

A. Classmates, and very close friends throughout the years, from that time.

Q. What is your position?

A. Secretary-treasurer of the Davenport Insurance Corporation of Richmond, Virginia.

664 Q. Connected with this gentleman on my right?

A. No connection.

Q. I believe that last year, or the year previous, you were accorded the honor of being the outstanding young man of the year in Richmond; that correct?

A. They described me as a representative of the young men of the area.

Q. Do you know Barbara Ford?

A. Yes, sir.

Q. For how long? 665

A. Don't recall — 1944 or 1945; something like that.

Q. Have known her a long time?

A. Yes.

Q. Do you have children?

A. Two, a daughter three and a half, and a son, two.

Q. Have you visited in the home of Mr. and Mrs. Ford, and seen them in Sanford, North Carolina? 666

A. In between the tobacco markets, prior to July 1959, I visited in their homes in Richmond when they were there on certain occasions, but more particularly since the first of the year my wife and I with our daughter visited Aubrey in Sanford, the weekend of the 9th of January, 1960. At that time all three of the children were there, and Mrs. Ford, Sr. 667

Q. Mr. Trigg, do you know the reputation for truth and veracity of Aubrey Ford?

A. I certainly do, sir, and would vouch for him in that regard.

Q. You would vouch for him. Will you tell us, in your opinion, whether it is good, bad, excellent, or what it is.

A. I would say that he has the qualities of a gentleman and is a person of high integrity. Every association that I have had with him, and that I have ever heard of have been of the highest calibre. 668

Q. Knowing him as well as you do, and knowing his reputation for truth and veracity as you do, can you conceive of any circumstances under which Aubrey Ford would not tell the truth?

A. I cannot, sir.

Q. Can you believe there could be a circumstance under which Aubrey Ford would not tell the truth?

A. Not to my knowledge.

669 Q. How about your belief?

A. Not to my belief.

Q. I would state this on the record, we had intended to examine this witness with regard to observation and so forth in the home in Sanford in January of this year, and I did not go into that because I understood that your Honor had made certain stipulations.

670 *The Court*: As to the fitness – practically a perfect record on both sides.

Cross Examination By Mr. Carter:

Q. Do you also know the reputation for truth and veracity of Barbara Ford in the community?

A. Yes, I do.

Q. Is it good or bad?

671 A. Would say it was fine.

Q. Can you conceive of any situation, knowing her reputation, under which she would tell a lie?

A. Not to my knowledge.

Q. To your belief?

A. Don't believe she would, no sir.

GEORGE PALMER, defense witness, having been duly
672 sworn, testified:

Direct Examination By Mr. Davenport:

Q. Mr. Palmer, how long have you known Aubrey Ford?

A. Since 1958, February 1958, in business, know him very well.

Q. Spend much time with him?

A. Yes, sir.
Q. Been on the markets with him?
A. Yes, sir.
Q. How does he conduct himself?
A. As a gentleman at all times. 673
Q. Do you know his reputation for truth and veracity in and around Sanford?
A. Yes, sir.
Q. What is it?
A. Know he would tell the truth under any circumstances.
Q. Are you familiar with what his present responsibilities are with the tobacco company? 674
A. Yes, sir. Mr. Ford is going to be in Sanford, North Carolina. Mr. Joyce and I will travel, mainly out of North Carolina, on various markets. Someone has to be in Sanford all the time, and under the present circumstances Mr. Ford will stay.
Q. What is your business?
A. Supervisor, Tobacco Merchants Corporation. 675
Q. The same company Mr. Ford is with?
A. Yes, sir.

By Mr. Carter: What is his position?
A. He is head of the purchasing, and overseer of purchasing.
A. Your superior?
A. Yes, sir. 676
Q. You work for Mr. Ford?
A. Yes, sir.
Q. For how long?
A. Since 1958, February.
Q. In that capacity, you travel together quite often?

A. Yes, prior to that time.

Q. How long have you known Barbara Ford?

A. Why, since 1958.

Q. Also know her reputation for truth and ver-
677 acity?

A. So far as I know, nothing against it.

Q. What do you think?

A. Do not know.

Q. What about her reputation?

A. Have heard no bad things about her.

Witness down.

678 MRS. ELIZABETH LONG, having been duly sworn, testified:

Direct Examination By Mr. Walker:

Q. Mrs. Long, where do you live?

A. I live in Sanford, North Carolina.

Q. For how long?

Q. A

A. Three and a half years.

679 Q. And is your husband living?

A. No, my husband died in 1958.

Q. Are you acquainted with Aubrey Ford?

A. Very well, since 1950.

Q. And what was the occasion or basis on which you were . quainted with Aubrey?

A. " " he was connected with the same business my husb vas in Kinston, and later my husband was
680 vice-pres. of the Tobacco Merchants Corporation, same company — in fact, he was instrumental in getting Aubrey with the company.

Q. Know whether or not he came to Sanford to live?

A. Yes.

Q. You were residing in Sanford at the time?

A. Yes.

Q. When did he move to Sanford with his family?

A. November, 1957.

Q. Are you acquainted with Mrs. Barbara Ford?

A. Yes, sir. 681

Q. How long have you known her?

A. Knew her when she came to Sanford with Aubrey, not before.

Q. Did not know her prior to that time?

A. No.

Q. Acquainted with the family in the respect of being family friends? 682

A. Yes, his mother and father were former friends of mine.

Q. Are you acquainted with the children?

A. Yes, very much.

Q. And have you been acquainted with the children since they have been in Sanford?

A. Yes, I have, when both of us would be there, the children were there, and when he would be there — 683
I would see them twice a week, they would come to my house, or we would go to them.

Q. Familiar with the circumstances and maintenance of Aubrey's home in Sanford, since the first of September?

A. Yes, he has a very nice person with the children.

Q. Who is she?

A. Mrs. Perry. 684

Q. Do you know her well?

A. In the same church with her, have known her before she went with the children, and have seen her many times since — has a kindergarten, reared two fine children — she is good with the children — making them happy.

Q. Have you visited in the home since the first of September of this year?

A. Yes, sir, many times.

Q. Been in the home, your home, with the children?

A. Yes, she has.

685 Q. Do you happen to belong to the same or a different church from Mr. Ford?

A. The same, St. Thomas Episcopal.

Q. Observe his attendance upon church and Sunday School?

A. Yes, he takes them to Sunday School, in town most of the time, since September he takes them, goes with them.

686 Q. Mrs. Long, do you know the reputation for truth and veracity of Aubrey Ford?

A. I certainly do. I think he is an excellent character, and think he would tell the truth under any circumstances. Have seen him under many occasions and have never known him to be any but the most excellent character, would defend it all the time, because I know he tells the truth.

687 *Cross Examination By Mr. Carter:*

Q. Do you know Mrs. Perry, the lady that runs the kindergarten?

A. Yes.

Q. Takes care of Mr. Ford's children?

A. Yes.

Q. Does she continue to operate the kindergarten?

688 A. Yes.

Q. Where is it?

A. In her home.

Q. What age group?

A. She takes care of young ones, don't know the age exactly.

Q. Prior to September of this year, did you have occasion to observe Barbara Ford taking her children to Sunday School?

A. Yes, I did.

689 Q. Who took the children to church prior to September?

A. Don't know, think I did see Barbara there with them, don't know who did it usually.

Q. Sing in the choir?

A. Yes, she did.

Q. Do you know Barbara Ford's reputation for truth and veracity?

690 A. As far as I know it is all right; have never known anything to the contrary.

Witness down.

MRS. COOPER MCIVER, having been duly sworn, testified:

Direct Examination By Mr. Walker:

Q. Mrs. McIver, where do you live?

691 A. Sanford, North Carolina.

Q. What does your husband do?

A. Publisher of the *Sanford Herald*, a newspaper, the *Daily Herald*.

Q. Do you have children?

A. Yes.

Q. And how long have you lived in Sanford?

A. Since I was about sixteen.

692 Q. Mrs. McIver, are you acquainted with the parties in this suit, Barbara Ford and Aubrey Ford?

A. Yes.

Q. Did you know them when they resided in Sanford?

A. Yes.

Q. Did you or not become fairly well acquainted with Mrs. Ford?

A. Yes, I saw right much of Barbara, not as much as you do of some people, but on many occasions knew Barbara fairly well.

Q. Considered yourselves good friends?

A. Yes.

693 Q. Did you have occasion to visit Mrs. Ford in Greenville?

A. I did.

Q. And would you tell us approximately when that was?

A. Don't know, think it was on Tuesday, August 9, because I came from Brevard, and we came down on Sunday, August the 7th.

694 Q. What was the occasion? How did it come about?

A. Well, my daughters, who are sixteen and twelve, are in love with their three children, and when we arrived in Brevard we saw a sign saying "Greenville 47 miles," and we said we must go to see the Fords. And I called Barbara, I think it was Tuesday morning, to see if she would like us to drive down for a few minutes, and we came down that afternoon.

695 Q. That is the afternoon to which we refer?

A. Yes.

Q. Where did you go in Greenville?

A. To Barbara's apartment.

Q. Who was there when you arrived?

A. Barbara and her mother.

Q. The children?

A. Yes.

696 Q. Did you have any conversation with Barbara?

A. Yes.

Q. Did you have any discussion with her concerning her and Aubrey?

A. Yes.

Q. Will ask you this, Mrs. McIver, did she or not say to you during your discussion words to the effect that reconciliation between her and Aubrey was not possible?

A. She did.

Q. Did I state the words substantially as she said them?

697 A. Would you like for me to recall what I can of the conversation?

Q. Yes, ma'am.

A. Well, I dived right in, and said "Barbara, isn't there any chance of you and Aubrey going back together?" And she said, "No, Cooper, it is completely out. I think it would be the worst thing that could happen for the children's sake." She also added that she believed 698 she would kill herself within a year if she did go back to him. And I asked if she still loved him, and she said, "No, all I have for Aubrey is pity," and why she pitied Aubrey is that he was so unsure of himself. I can't remember the conversation, but that was the idea, and also asked if she dreaded Aubrey's trips to Greenville to see the children, and she said, yes, she dreaded them.

699 The Court asked the statement to be repeated, with reference to still loving Aubrey, which the witness did.

Q. How long did you stay on this visit?

A. Arrived at 5 or 6 stayed until – left at 8; went out and had supper, her children and she went with us, had a sandwich, and left about 8.

Q. Did she make any mention to you at that time of Aubrey's coming to Greenville that day, or any time in 700 the near future?

A. When I asked her about coming, she said it would be fine to come that day because Aubrey was coming down. I don't know whether she knew what day, and whether she said, and she had said for us to

come as soon as we could, to come on immediately, wanted us to come on is what I gathered.

Q. And you did come promptly, the same day?

A. The same day.

Q. Did she make any mention to you of a suit being filed by her against Aubrey?

701 A. No, sir.

Q. Did she make any mention to you, or did you have any discussion with her, of Mrs. Ford, Aubrey's mother's, death?

A. Yes, and she spoke very respectfully of Mrs. Ford, and I asked what will happen to the children, now that Mrs. Ford was gone, and she said she hoped 702 she would get them, but it was very indefinite, didn't say how she planned to get them.

Q. There was nothing specific that you recall in that respect, that I just asked about?

A. Please repeat.

Q. You had answered the question with regard to Mrs. Ford's death, and with regard to it, I asked about the suit, and I believe you had said that she did not say 703 anything specific or exactly about how she expected to get custody of the children?

A. That is true.

Q. And my question was simply this: Then she did not say anything specific in that respect which you recall?

A. That is right.

Cross Examination By Mr. Carter:

704 Q. She just said she hoped she would get the children?

A. Yes.

Q. Mrs. McIver, in your conversation about the possibility of reconciliation, you were friends of both, genuinely interested?

A. Yes, strictly friendly.

Q. Was it now substantially that it looked like a reconciliation was impossible?

A. Yes.

Q. Did she explain why she said she dreaded Aubrey's coming to visit the children? 703

A. Said that they had nothing to say to each other, if either one said anything, the other got mad, and there was no conversation between them that was pleasant.

Defense rests.

MRS. FORD re-called:

Examination By Mr. Carter:

706

Q. You have heard the testimony of Mrs. McIver?

A. Yes.

Q. Is her testimony correct, when she said that you said, substantially, it looked like it was impossible to have a reconciliation?

A. That is right.

Q. And you heard her testify that; it was substantially correct you told her that it looked impossible for a 707 reconciliation?

A. That is right.

Q. Is that correct?

A. That is right.

Q. She also stated that you stated you dreaded to see him come and explained your answer to some extent; did you say that?

A. I guess I did. 708

Q. Did you explain why you dreaded to see him come?

A. No.

Q. Don't remember doing that?

A. No.

Q. Heard your husband testify that you had called, and mentioned something about his relationship with Dorothy the maid prior to entering into an agreement. Did you call him?

709 A. Don't think Aubrey thinks he is lying; did call and say to him that there must be something between Dorothy and Aubrey or she would not have told him these things, and would not be on his side.

Q. Did you know of any of little Aubrey's testimony at that time?

A. No.

710 Q. Did you know of little Aubrey's testimony prior to the agreement?

A. No, I did not.

Q. When did you learn of the first time?

A. The day that Dorothy went to New York to sail for Europe.

Q. Had you entered into an agreement with your husband at that time?

711 A. Yes. Remember thinking how ironic that it did not come out until the agreement was made. Know she was not in New York because we called the hotel that Aubrey's company always houses their foreign people that stay in New York, and she was not registered. Could not get in touch with her, would not have signed the agreement.

Q. You called?

712 A. Yes, the one hotel that I knew – where Aubrey's company put their foreign people.

By the Court: You tried to locate Dorothy?

A. Yes.

Q. And would not have signed the agreement?

A. Would not have signed the agreement had I known of my son's statement.

713 *By Mr. Carter:* Barbara, there have been two or three statements made about a reconciliation, that you have made. I ask you whether or not you have tried on several occasions to discuss and reconcile the difficulties?

A. Last fall, repeatedly.

Defense objected to both question and answer.

Excluded by the judge.

714 *By Mr. Walker:* Mrs. Ford, you did consider Dorothy a very close friend of yours, did you not?

A. Yes, I did.

Q. And I believe you have already testified that you confided in her with regard to your own affair?

A. Yes, sir, I did.

Q. Now, did I understand you to say that you had talked with Aubrey and made some mention of Dorothy 715 prior to the time that the agreement was made?

A. I am a very naive person. I did not realize it was Dorothy who had told Aubrey until I got to Richmond and saw that must be it. I had no suspicion of this until September. I had seen her rubbing his back, and I know it made me very mad.

Q. My question was, did I understand you to testify that prior to the time this agreement was made that you 716 did make mention, or contend to Aubrey something about Dorothy?

A. Yes, I did, over the telephone or in person – I don't know which – it was the opinion of everybody I talked to.

Q. You say that you did mention Dorothy to

Aubrey in a discussion prior to making that agreement?

A. Yes.

Q. And, Mrs. Ford, you still entered into it and you had no report from anyone who ever told you anything about Dorothy?

717 A. Suspicions, that is all.

Q. You had only suspicions?

A. I had only talked to my son until that day.

Q. Did you have, did you not have any suspicions during the year and a half that she was in the home there as your close friend?

A. No, I am very naive.

Q. And consequently you had no suspicion until
718 after you had your own affair over the period of six or seven weeks? And until you were talking with your husband in Richmond about this agreement that was made?

A. I did not say that.

Q. You did not suspect it while you were living as husband and wife?

A. No, sir.

Q. Did not have any suspicion of it during the
719 entire life in Sanford, as husband and wife?

A. No, sir.

Q. So, I am asking you if this is not the fact: That you had no suspicion of it until after you had had your affair with James Sloan, and until you were in Richmond preceding or entering into this agreement?

A. I had suspicions, and that is all.

Q. When?

720 A. Of Aubrey and Dorothy.

Q. But not until you were in Richmond after you had separated and were represented by counsel and making an agreement?

A. Yes.

Q. And that was the first time you had suspected it?

A. Yes, and even then not sure.

Q. And that is exactly what I wanted to bring out here in this testimony: That you never had any suspicion during the entire time that you were residing together as husband and wife and this girl was living in your home?

A. That is correct.

By Mr. Carter: He has asked that question three times.

By Mr. Walker: (But I got the answer) Then, the first time you had any suspicion was when you were represented by counsel and were working toward the making of this agreement?

A. Yes, and even then wasn't sure.

Q. And during that time you knew, of course, that he knew and others knew about your affair?

A. Yes, many others.

Q. And as a matter of fact, you had confided in many people?

A. Three, my family and one outside.

Q. And Dorothy?

A. And Dorothy.

Q. And it was subsequent to the agreement, you say, when little Aubrey made this statment?

A. Yes, sir.

Q. Did you make any mention of your suspicion that you had acquired in the negotiations leading to the agreement?

A. Only to Aubrey.

Q. Only to him?

A. I just said, "If you have been doing this thing, if your hands are not clean, why are you doing this to me?"

Q. You made no issue of it?

A. No, there was not any issue.

Q. And subsequent to that statement little Aubrey made to you, you made a record?

A. December 22, 1959.

Q. Where were you at that time?

725 A. My mother's house, in little Aubrey's room.

Q. Did you come to Greenville during the fall of 1959?

A. No, sir.

Q. Were you in Greenville between the time of your separation in August, 1959, and January 1, 1960?

A. No, sir, not until t[illegible] 10th of January.

726 Q. 10th of January, 1960; did you not testify that you had consulted with Dr. Will Fewell with regard to this record?

A. I said Dr. Fewell had suggested I make it.

Q. You were not in Greenville?

A. No, did not talk to Dr. Fewell.

Q. Did not talk to him?

A. Did not.

727 Q. Did you testify Dr. Fewell suggested it be made? When?

A. Did not bring it up until then.

Q. How did you make the call, by telephone? How did Dr. Fewell advise you when you had not seen him?

A. My mother talked to Jess Fewell, who is her best and closest friend.

Q. Your mother talked to him?

728 A. Yes.

Q. Your mother talked to him in Greenville?

A. Not to him, to Jess over the telephone. And she asked him what to do.

Q That brought his recommendations into it, and

through your mother you talked with his wife, who in turn talked with him?

A. Yes.

Witness down.

Plaintiff rests. 729

Hearing ended.

October 25, 1960.

ORDER

This is an appeal from the Juvenile and Domestic Relations Court of Greenville County. The appeal was argued at a Special Equity Term of the Court of Common Pleas for Greenville County January 9, 1961. 730 The case was commenced by the service upon the defendant of an amended complaint and a temporary custody order of the Juvenile and Domestic Relations Court of Greenville County. The case involves the custody of the three minor children of plaintiff and the defendant. These three children are two boys and a girl, H. Aubrey Ford, III, seven years old; Barbara Gray Ford, five years 731 old; and James L. Ford, three years old. The plaintiff's amended complaint alleges that the plaintiff and defendant were married March 16, 1952, and are the parents of three children; that these children are living with the plaintiff in Greenville County; that the defendant is an unfit person to have the custody of the children; that the plaintiff is a proper person to have the custody of the children. The complaint then prays for a temporary and 732 permanent order giving the plaintiff custody of the children and for reasonable support for the plaintiff and the children. The complaint is dated August 3, 1960. On August 5, 1960, the Juvenile and Domestic Relations Court of Greenville County issued, what appears to have been, an ex parte order giving the plaintiff temporary custody of the three children. The order and amended complaint

were served upon the defendant on August 10, 1960.

In due time, the defendant, the appellant in this case, served his answer upon the plaintiff, the respondent in this case. In this answer the defendant, first, set
733 up a general denial and then proceeded to answer specially the allegations of the complaint. The defendant stated in his answer, that the last residence of the plaintiff and defendant as husband and wife was Sanford, North Carolina; that the plaintiff's present custody of the three children is the result of an agreement between the plaintiff and the defendant; that this agreement for custody was entered into by plaintiff and defendant in
734 order to settle a custody proceeding before the Law and Equity Court of Richmond, Virginia; that according to that agreement the plaintiff was to have custody of the children for the summer period beginning two weeks from the date the last child completes the school year and ending two days before the first child is to return to school in September and except as otherwise provided,
735 the defendant was to have custody of the children; that the plaintiff has broken this agreement; that the plaintiff has been guilty of adultery and is not a fit person to have the children; that the defendant is a fit person to have the custody of the children and such custody should be awarded to him. The defendant prayed that the temporary order of custody be dissolved and the plaintiff's complaint dismissed; that the defendant be given cus-
736 tody of the children pursuant to the agreement between the parties; that the plaintiff be enjoined from violating that agreement and that the plaintiff be declared unfit to have the custody of the children.

This case came for trial before the Juvenile and Domestic Relations Court for Greenville County on October 24th and 25th, 1960, and considerable testimony was

received from both sides. The plaintiff and the defendant both testified. That Court issued its order on December 8, 1960, in which the Court held:

"'(1) That the plaintiff shall have, and she 737
is hereby awarded, custody and control of the minor children of the parties;

"(2) That the defendant shall have reasonable visitation rights and these shall include some holidays and school vacation periods and are to be agreed upon by the parties;

"(3) That a reasonable sum for support of the minor children is One Hundred and no/100 ($100.00) Dollars per week, this to begin Sat- 738
urday, December 17, 1960, * * *"

At the time of the hearing before the Court, I held that upon this appeal there should be included as a part of the record the transcribed typewritten record of evidence, the narrative statement of the proceedings and the exceptions and amendments to the narrative statement.

The defendant appealed from the order of the Juve- 739
nile and Domestic Relations Court of Greenville County. The defendant filed numerous exceptions to that order, all of which, in one manner or another, excepted to the ruling of that Court on the question of the custody of the three children.

I agree with the Judge of the Juvenile and Domestic Relations Court that the custody of these three minor 740
children may well be left in the hands of either the plaintiff or the defendant. He states that they are both fit to have the custody of the children. I cannot agree with that esteemed Jurist, however, that the complete custody of the three children should be left in the hands of the plaintiff and the defendant granted only reasonable visitation rights to be agreed upon with the plaintiff.

The rights of custody and visitation of the plaintiff and the defendant with their children should be clearly defined. Therefore, it is the order of this Court that the plaintiff shall have the custody, care and control of these
741 three children during the normal school year, commencing in September and ending in the early part of June. The defendant shall have the custody of these three children during the normal school holiday months, commencing in the early part of June and ending in the early part of September. The defendant shall also have the custody of these three children during the Christmas
742 holidays. During the periods of time that the defendant has the custody of these children, he shall not be liable to pay the plaintiff any money for their support or maintenance. Should the defendant take the custody of the children or relinquish the custody of the children during the middle part of any week, the weekly support payments shall be prorated for any such week. While either the plaintiff or the defendant has the custody of
743 the children, the other party shall be permitted to see or visit the children at reasonable times and reasonable places.

Much has been said in this case about the agreement that was reached between the plaintiff and the defendant, as a result of the settlement of the Habeas Corpus custody proceeding before the Law and Equity Court of the City of Richmond, Virginia, being res adjudicata
744 and controlling in this proceeding. To hold that the custody of these three children was fully and finally determined in Richmond, Virginia, by the agreement reached between the plaintiff's attorneys and the defendant's attorneys would be unfair to the children and too harsh a rule to follow. The children were not parties to the suit in Richmond, Virginia. The children were before

that Court only in the capacity of bodies that were being contended over. The children were merely the res that was being pulled back and forth between the mother and father. These children are the especial charges of this Court of Equity and their interest is paramount and 745
even if it is necessary to disregard established principles of law in order to protect their interest that will be done by a Court of Equity when it appears that the best interest of the children is jeopardized. In the heat of this litigation, which has decided spiteful and selfish overtones, the plaintiff and the defendant both overlook the fact that each has admitted that the other is qualified 746
to have the custody of the three children. The plaintiff and the defendant have done this by their acts and by their agreements. The welfare and best interest of these three infants must be settled and protected. An end should be put to this litigation in which the children are used as pawns by their mother and father to injure and wound one another. The plaintiff and the defendant are substantial citizens from the upper strata of society. 747
They must understand that the custody of their children should be settled. These children had no voice in their own birth and no voice in the collapse and disintegration of the marriage that sponsored their conception and birth. These children have had no voice in the legal struggle that is being waged over their custody except in so far as each parent claims the right to decide the manner in which the custody of the children should be 748
divided. The children are all very young, being three, five and seven years old. They should be kept together and raised together as brothers and sisters as much as possible. This means then that at the present time the custody division between the mother and father must be made along the lines of the school year. While the children are so young, the greater part of the custody of

the children should be given to their mother. This order deals solely with the custody of the three children. It has no more finality than the previous orders that also concern their custody. Any Court of competent jurisdiction should hear either the plaintiff or the defendant upon this question if a change is made necessary for
749 the best interests of the children. Therefore, it is the Order of this Court:

(1) The custody, care and control of the three minor children, H. Aubrey Ford, III, Barbara Gray Ford and James Lowry Ford, is awarded jointly to the plaintiff and the defendant in accordance with the terms of this Order;

750 (2) The plaintiff shall have the custody, care and control of the three minor children during the normal school year commencing in September and ending in the early part of June of each year. The defendant shall have the custody, care and control of the three minor children during the normal school holiday months, commencing in the early part of June and ending in the early part of September of each year. The defendant
751 shall also have the custody, care and control of the three minor children during the normal Christmas holidays of each school year. During the time that either the plaintiff or the defendant has the custody, care and control of the three children, the other party shall be permitted to see or to visit with the children at reasonable times and reasonable places;

(3) The defendant shall pay to the plaintiff for
752 the support, care, maintenance and upkeep of the three children the sum of One Hundred ($100.00) Dollars per week, during the time that the plaintiff has the custody, care and control of the children. When the defendant has the custody of the children he will not pay the plain-

tiff anything. If the defendant takes the custody of the children from the plaintiff or delivers the custody of the children to the plaintiff during the middle of any week, then the payments for that particular week shall be prorated. 753

In so far as this Order differs from the Order of the Juvenile and Domestic Relations Court for Greenville County, that Order is overruled and amended. Otherwise, it is affirmed and made the Order of this Court.

AND IT IS SO ORDERED.

JOHN GRIMBALL,
Presiding Judge,
Thirteenth Judicial Circuit 754

February 25, 1961.

STIPULATION

It is agreed that due and proper notice was given by Appellant of its intention to appeal, such notice being acknowledged March 10, 1961.

EXCEPTIONS 755

I

That the Court erred in failing to hold that the agreed Order of dismissal in the habeas corpus proceeding in Richmond, Virginia and the agreement reached by the parties concerning custody was binding and stood as res adjudicata to the issues in this action.

(a) It is respectfully submitted that it was error 756 to refuse to recognize in accordance with the Full Faith and Credit Clause of the Constitution of the United States such res adjudicata when there was no evidence of subsequent misconduct on the part of Appellant or a change of circumstances as to proper custody and control of the children.

II

That the Court erred in awarding Respondent the custody, care and control of the three (3) minor children during the normal school year commencing in September and ending in the early part of June of each
757 year when such was the opposite of the agreement previously made between Appellant and Respondent which determined the matter of custody and was binding upon the parties.

(a) It is respectfully submitted that it was error to make such an award to Respondent when her Complaint was based upon an allegation of misconduct and unfit-
758 ness on the part of Appellant which Respondent failed to prove or support by evidence.

(b) It is respectfully submitted that the evidence and testimony did not justify taking the custody of the children away from the Appellant for such period and awarding it to the Respondent.

(c) It is respectfully submitted that Respondent did not show by the greater weight of the evidence that
759 the agreement between the parties voluntarily entered into by her upon the advice of counsel should not be recognized because the welfare of the children requires a different disposition of the custody.

III

That the Court erred in holding the Respondent to be a fit and proper person to have custody of the chil-
760 dren and to award to her the greater part of the custody when the testimony and evidence including Respondent's admitted adultery and sexual immorality were contrary to such finding.

AGREEMENT

It is agreed that the foregoing when printed shall constitute the Record with Exceptions on appeal to the Supreme Court, and a printed copy thereof shall be filed with the Clerk of the Supreme Court as a return.

761

LEATHERWOOD, WALKER, TODD & MANN
Attorneys for Appellant

CARTER & HILL
and
HAYNSWORTH, PERRY, BRYANT,
MARION & JOHNSTONE
Attorneys for Respondent

762

763

764

[fol. 195]

IN THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

BARBARA D. FORD, Respondent,

v.

HERMAN A. FORD, Appellant.

Appeal From Greenville County
John Grimball, Judge

Case No. 4764
Reversed

Leatherwood, Walker, Todd & Mann, of Greenville, and Denny, Valentine & Davenport, of Richmond, Virginia, for appellant.

Carter & Hill and Haynsworth, Perry, Bryant, Marion & Johnstone, all of Greenville, for respondent.

OPINION No. 17850—Filed November 15, 1961

Moss, A. J.: Barbara D. Ford, the respondent herein, and Herman A. Ford, the appellant herein, were married on March 16, 1952, in Richmond, Virginia. Three children were born of this marriage and they were at the time of the institution of this action seven, five and three years of age, respectively.

The respondent did, on August 10, 1960, commence this action in the Greenville County Juvenile and Domestic Relations Court seeking custody of the three minor children of the marriage. The complaint alleged that the children were residing with the respondent in Greenville County, South Carolina, and that it was for the best interest of the said minor children that their custody be awarded to her.

It is further alleged that the appellant had been guilty of misconduct and was an unfit person to have custody of the said children. The answer of the appellant alleges that the appellant and respondent are living separate and apart on account of the misconduct of the respondent. It is further alleged that the respondent is not a fit or proper person to have the custody of the said minor children by reason of her misconduct. The answer further alleges that the appellant is entitled to the custody of the said minor children of the marriage, he being a fit and proper person to have such custody and is financially able to provide for the education, maintenance and support of the said children in a comfortable and desirable home in Sanford, North Carolina.

The answer further alleges that the appellant and respondent separated on August 25, 1959, and the respondent went to the home of her mother in Richmond, Virginia, the children remaining in North Carolina in the custody of the appellant. It is further alleged that on August 27, 1959, that the respondent took the children of the marriage from the State of North Carolina to the home of her mother in Richmond, Virginia. It is further alleged that on August 28, 1959, the appellant did, in the Law and Equity Court of the City of Richmond, Virginia, file a petition for a Writ of Habeas Corpus directing the respondent to produce the bodies of the three children before the Court at a time and place to be specified and to do and receive what shall then and there be considered by the Court concerning said children, and that the care, custody and possession of the said children be awarded to the appellant. An Order awarding a Writ of Habeas Corpus was issued by the Law and Equity Court of Richmond, Virginia, on August 28, 1959, directing the respondent to have and produce the bodies of the said children before the Court on September 2, 1959, and to abide the direction of the Court as to the custody of said children. The respondent filed a Return to the Writ of Habeas Corpus alleging that she was a fit and proper person to have the custody of the said infant children. She asked that the Writ be discharged as having been improvidently issued without probable cause.

The answer of the appellant further alleged that during the pendency of the Habeas Corpus proceeding in the Law

and Equity Court of the City of Richmond, Virginia, both [fol. 196] parties being represented by competent legal counsel, an agreement was reached concerning the children of the marriage. Under the terms of the agreement, the appellant was given custody of the three children with the right to the respondent to have custody of the three children during the summer vacation from school and certain holiday periods. Upon the consummation of the aforesaid agreement reached between the parties, a "Consent Dismissal" was had of the Habeas Corpus proceeding instituted by the appellant. The Order of Dismissal by the Law and Equity Court of the City of Richmond, Virginia, filed November 18, 1959, was as follows:

> "It being represented to the court by counsel that the parties hereto have agreed concerning the custody of the infant children, it is ordered that this case be dismissed."

The instant case was tried before the Honorable J. Wilbur Hicks, Judge of the Greenville County Juvenile and Domestic Relations Court, and on December 8, 1960, he issued his order awarding the custody of the children to the respondent, with the provision that the appellant "shall have reasonable visitation rights and these shall include some holidays and school vacation periods and are to be agreed upon by the parties." The appellant duly excepted to the order of the Judge of the Juvenile and Domestic Relations Court and alleged error, *inter alia*, (1) That the Judge erred in failing to hold that the agreement previously made between the parties, through their respective counsel, at a time when an action was pending in the Law and Equity Court of the City of Richmond, Virginia, determined the question of custody and was binding upon the parties. It was asserted that the respondent admitted the making of such agreement and acknowledged that she was represented in such proceeding by able and compet nt counsel. It was further alleged as error that the court failed to hold that the agreed Order of Dismissal of the Law and Equity Court of the City of Richmond, Virginia, was *res judicata* as to the issue of custody before this Court. (2) That the Judge erred in failing to hold that the

said agreement between the parties and the aforesaid agreed Order of Dismissal was binding and *res judicata*. It was further submitted that the Juvenile and Domestic Relations Court of Greenville County must recognize, in accordance with the full faith and credit clause of the Constitution of the United States, the agreed Order of Dismissal of the Virginia Court and that such was *res judicata*, unless there was evidence of subsequent misconduct on the part of the appellant or a change of conditions warranting a change of the custody of the children. (3) That the Judge erred in awarding the custody of the children to the respondent and giving the appellant only visitation rights to be agreed upon by the parties.

The appeal from the order of the Judge of the Juvenile and Domestic Relations Court of Greenville County was heard by the Honorable John Grimball, presiding Judge, on January 9, 1961, at a special Equity term of the Court of Common Pleas for Greenville County, South Carolina.

By an order dated February 25, 1961, the presiding Judge overruled the provision of the order of the Juvenile and Domestic Relations Court to the extent that he awarded the custody of the three minor children jointly to the respondent and the appellant, placing the custody of the said children in the respondent during the normal school year, commencing in September and ending in the early part of June of each year. He awarded custody of the three minor children to the appellant during the normal school holiday months, commencing in the early part of June and ending in the early part of September of each year. This order provided further that the appellant should have the custody and control of the children during the normal Christmas holidays of each school year. It was further provided that during the time that either the respondent or appellant had custody, the other party should be permitted to see or visit with the children at reasonable times and places. The presiding Judge refused to hold as *res judicata* the custody agreement reached by and between the parties, as a result of which the Habeas Corpus proceeding instituted by the appellant in the Law and Equity Court of the City of Richmond, Virginia, for the purpose of obtaining a custody of the minor children of the parties, was dismissed. He like-

wise refused to give full faith and credit to the agreed dismissal order of the Virginia Court. Within due time the appellant gave notice of intention to appeal to this Court from the order of the lower Court. The appellant asserts [fol. 197] that the trial Judge erred in refusing to hold as *res judicata* the "Consent Dismissed" order of the Law and Equity Court of the City of Richmond, Virginia, which was made after the parties to this action had reached an agreement concerning the custody of the infant children here involved.

It is provided in Article IV, Section 1, of the Constitution of the United States, that:

> "Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

In the case of Hamilton v. Patterson, 236 S. C. 487, 115 S. E. (2d) 68, this Court said:

> "* * * Where a judgment rendered by a court having jurisdiction of the cause and the parties is challenged in another State, 'the full faith and credit clause of the Constitution precludes any inquiry into the merits of the cause of action, the logic or consistency of the decision, or the validity of the legal principles on which the judgment is based.' Milliken v. Meyer, 311 U. S. 457, 61 S. Ct. 339, 342, 85 L. Ed. 278. 'Because there is a full faith and credit clause a defendant may not a second time challenge the validity of the plaintiff's right which has ripened into a judgment.' Magnolia Petroleum Co. v. Hunt, 320 U. S. 430, 64 S. Ct. 208, 214, 88 L. Ed. 149, 150 A. L. R. 413.
>
> "This clause of the Federal Constitution U. S. Const. art. 4, section 1 and the Act of Congress which implements it 'require the judgments of the courts of one State to be given the same faith and credit in another State as they have by law or usage in the courts of the State rendering them.' Morris v. Jones, 329 U. S. 545, 67 S. Ct. 451, 454, 91 L. Ed. 488, 168 A. L. R. 656."

In order to make out the defense of *res judicata*, the following elements must be shown: (1) The parties must be the same or their privies; (2) The subject matter must be the same; and (3) While generally the precise point must be ruled, yet where the parties are the same or are in privity, the judgment is an absolute bar not only of what was decided but what might have been decided. Mackey v. Frazier, 234 S. C. 81, 106 S. E. (2d) 895.

What was the effect of the agreed order under the Virginia Law and which came about as a result of a custody agreement reached between the parties with the advice and consent of their counsel? Does an agreed order of dismissal under the Virginia practice put an end to a pending suit and bars any subsequent suit on the same cause of action between the same parties? In the case of Bardach Iron & Steel Co., Inc. v. Tenenbaum, 136 Va. 163, 118 S. E. 502, the effect of an order "dismissed agreed" is fully discussed. The order there involved was "on motion of the plaintiff and with the consent of the defendant, this cause is dismissed agreed." The Virginia Court in discussing the effect of such order, said:

> "Ordinarily, the records of a court of record remain in the breast of the court, and subject to change or alteration by the court during the term at which they are made, but an order 'dismissed agreed' is an exception to the general rule. The court has no power to make such a record except by consent of the parties, and, having obtained such consent and made the entry, it is equally without power to set it aside without the consent of both parties, except upon some ground that would warrant the setting aside of other contracts of like nature. It is a contract of record that the court is without power to disturb except as stated. The court may correct its own errors, but cannot change the contracts of parties without their consent. Deaver v. Jones, 114 N. C. 649, 19 S. E. 637; Hammond v. Place, Har. (Mich.) 438. If the trial court was without power to set aside the order 'dismissed agreed' made on December 8, 1921, that was an end of the case. Such an order not only puts an end to the pending suit, but is

a bar to any subsequent suit on the same cause of action, between the same parties, as fully as a retraxit would be.

[fol. 198] "'It is a declaration of record sanctioned by the judgment of the court, that the cause of action has been adjusted by the parties themselves, in their own way.' Hoover v. Mitchell, 25 Grat. (66 Va.) 387, 388; Wohlford v. Compton, 79 Va. 333; Siron v. Ruleman, 32 Grat. (73 Va.) 215, 223; Jarboe v. Smith, 10 B. Mon. (Ky.) 257, 52 Am. Dec. 541; U. S. v. Parker, 120 U. S. 89, 7 Sup. Ct. 454, 30 L. Ed. 601; Simmons v. Yoho (W. Va.), 115 S. E. 851, 857; 1 Freeman on Judgments, sec. 262; 2 Black on Judgments, sec. 706.

"In Jarboe v. Smith, 10 B. Mon. (Ky.) 257, 52 Am. Dec. 541, it is said to be a bar between the parties on the original cause of action, unless there is an express stipulation that another suit may be brought. In the judgment entered in Hoover v. Mitchell, supra, it is said that the dismissal of a suit agreed, without any explanation or qualification showing a contrary intention, is at least a prima facie determination of the matter controverted in that suit, but the opinion in the case holds that 'dismissed agreed' is equivalent to a retraxit. But to have this effect there must have first been an unqualified agreement that the suit should be 'dismissed agreed.'"

In the case of Murden v. Wilbert, et al., 189 Va. 358, 53 S. E. (2d) 42, it was held that the judgment of a court of competent jurisdiction dismissing a suit agreed, upon the ground that it had been agreed by the parties, is a final determination, as to those parties, of the matters litigated in that suit. It was further held that an order "dismissed agreed" is a contract of record that the court is without power to disturb except with consent of the parties.

In the case of Hinton v. Norfolk & W. Ry. Co., 137 Va. 605, 120 S. E. 135, it appears that there was a mutual agreement to settle an action brought by an infant, by his next friend, by payment of the demand in full and was reported to the court and a motion was made by plaintiff to dismiss

such action. The order stated that the action was "dismissed settled". The Court said:

> "* * * Every distinguishing feature of a case 'dismissed agreed' appears, for there is the mutual agreement to terminate the case, which is reported to the court, and the consequent motion by the plaintiff to dismiss it. The consequences of such a dismissal are well understood and constitute a bar to a subsequent action between the same parties for the same cause.
>
> "It is sufficient to cite the recent case of Bardach I. & S. Co., Inc. v. Tenenbaum, 136 Va. 163, 118 S. E. 502."

In the case of Virginia Concrete Co. v. Board of Supervisors, 197 Va. 821, 91 S. E. (2d) 415, the Virginia Court said:

> "A retraxit is a voluntary renunciation by the plaintiff in open court of his suit and the cause thereof, and by it he forever loses his action. 6 Mich. Jur., Dismissal, etc., sec. 35, p. 244; Burks Pl. & Pr., 4 ed., sec. 337, p. 646.
>
> "An order 'dismissed agreed' not only puts an end to the pending suit, but is a bar to any subsequent suit on the same cause of action by the same parties 'as fully as a retraxit would be.' Bardach Iron & Steel Co. v. Tenenbaum, 136 Va. 163, 171, 118 S. E. 502, 505."

In this same Virginia Concrete Co. case it was further held that a dismissal order, even in general terms, which does not contain any reservation of right of either party to sue thereafter, is *res judicata* with respect to all matters covered by the pleadings of the case. The Court said:

> "In Wilcher v. Robertson, 78 Va. 602, 618, it is likewise said that 'An order simply dismissing the suit is not a determination on the merits, and so is not a bar to the maintenance of a second suit for the same cause of action.' But in the earlier case of Taylor v. Yarbrough, 13 Grat. 183, 194; 54 Va. 183, 194, it was held that a decree which dismissed a bill in general

terms and without any specification of grounds therefor, or reservation of a right to sue thereafter, must be taken to rest upon all the issues presented by the [fol. 199] pleadings and regarded as a final judgment of the entire right asserted. Much depends on the stage of the proceedings at which the order was entered and the reason for its entry. It is well, therefore, to heed the admonition in Lile's Equity Pl. & Pr., 3d ed., sec. 273, p. 157, that where the plaintiff voluntarily dismisses his suit or when it is dismissed involuntarily for reasons not affecting the merits of the case, the order should recite that the dismissal is 'without prejudice to plaintiff's right to institute such further suits concerning the same matter as he may be advised,' in order to avoid a plea of *res judicata* in future litigation. See also Newberry v. Ruffin, 102 Va. 73, 76, 45 S. E. 733."

The North Carolina case of Steele v. Beaty, et al., 215 N. C. 680, 2 S. E. (2d) 854, was an action to recover damages for personal injuries alleged to have been caused by an assault by the defendants. The defendants pleaded settlement and a judgment in a former action based on the same cause of action. It appears that when the settlement was made that the order provided "Upon motion and by consent it is agreed that said action be, and the same is hereby dismissed." A judgment was rendered for the plaintiff and an appeal was prosecuted by the defendants. In reversing the judgment of the lower Court, the Supreme Court of North Carolina held that a "judgment of dismissal" entered by agreement of the parties pursuant to a compromise and settlement of the controversy is a judgment on the merits barring any other action for the same cause. It was further held that a "judgment in retraxit" is usually based upon and follows a settlement out of court, and like a judgment on the merits is a bar and estops plaintiff from again proceeding in another suit on the same cause of action. It was also held that the legal effect of an order dismissing a suit agreed is to bar any other suit between the same parties on the original cause of action, thus adjusted by them and merged in the judgment of the court,

rendered at their instance, and in consequence of the agreement. We quote the following from this case:

> "To hold that a judgment of dismissal by consent is not a bar would deny any effect whatever to the agreement of the parties and would treat the judgment of dismissal merely as a voluntary act of the plaintiff. Doan v. Bush, 130 Ark. 566, 198 S. W. 261, L. R. A, 1918B, 523. The legal deduction to be drawn from a judgment dismissing a suit by agreement of the parties is that the parties had by their agreement adjusted the subject matter of the controversy in that suit; and the legal effect of such a judgment is, therefore, that it will operate as a bar to any other suit between the same parties on the identical cause of action then adjusted by them and merged in the judgment therein rendered at their instance and in consequence of their agreement."

In the case of Yancey v. Yancey, 230 N. C. 719, 55 S. E. (2d) 468, the husband brought an action against his wife to establish a resulting trust in realty. A previous action for the same cause had been dismissed and judgment entered "that the matters and things in controversy have been settled between the parties," and that, therefore, it was "adjudged and decreed that the plaintiff be nonsuited." The lower Court held that the previous judgment for the same cause, nonsuiting the plaintiff and reciting that the matters involved had been settled between the parties, was a bar to this action, citing the case of Steele v. Beaty, et al., supra. The Supreme Court of North Carolina affirmed the judgment of the lower Court. In the opnion, it is stated that the plaintiff admits the previous order above quoted. It is further stated that the plaintiff did not allege fraud, nor did he attack the judgment nor seek to vacate it. The Court said:

> " • • • Hence standing upon the docket it is a judgment of retraxit, and it bars a new action. Before he can prosecute another action for the same cause he must in some proper way remove this judgment from his

pathway. Moody v. Wike, 170 N. C. 541, 87 S. E. 350; Fowler v. Fowler, 190 N. C. 536, 130 S. E. 315; McIntosh Prac. & Pro. 745."

In the West Virginia case of In Re McIntosh's Estate, 109 S. E. (2d) 153, the Supreme Court of Appeals of the State, said:

[fol. 200] "* * * A judgment recording a compromise settlement and dismissing the action 'settled and agreed' is sufficient on which to found a res judicata plea. Central Trust Co. v. Harless, 108 W. Va. 618, 152 S. E. 209; Murden v. Wilbert, 189 Va. 358, 53 S. E. (2d) 42; 50 C. J. S. Judgments, sec. 634."

A review of the cases decided in Virginia convinces us that the Order of Dismissal by the Law and Equity Court of the City of Richmond, Virginia, was a "dismissed agreed" one because it appears upon the face of the order that there was a settlement between the parties concerning the custody of the infant children and there was a mutual agreement to terminate the case. Such a judgment of dismissal entered by agreement of the parties, pursuant to a compromise or settlement of the controversy, is a judgment on the merits, barring another action for the same cause and is equivalent to a judgment of retraxit. If the respondent here had instituted in the Courts of Virginia the action commenced by her in the Courts of this State, the appellant could have successfully interposed a plea of *res judicata* as a defense to said action. Since the judgment entered in the Virginia Court by agreement or consent is *res judicata* in that State, it is *res judicata* and entitled to full faith and credit in this State. We are required under Art. IV, Sec. 1 of the Constitution of the United States to give the same faith and credit in this State to the "dismissed agreed" order or judgment as "by law or usage" the Courts of Virginia would give to such order or judgment.

It is undisputed that the parties in the Virginia proceeding are the same as the parties here. The issue before the Court in Virginia and in the Court here was which of the

parties should have the custody of the three minor children. There is, therefore, an identity of parties and subject matter.

We should point out that we have held in a number of cases that changed circumstances may authorize the change of custody of minor children. We have held that the Court may at any time on the application of any interested party, or even on its own motion, upon sufficient showing, make further disposition of the custody of a child, if new facts and circumstances make it necessary or desirable for the child's welfare. A judicial award of the custody of a child is never final. Ex Parte Atkinson, 238 S. C. 521, 121 S. E. (2d) 4. Applying this rule to the instant case and after examining the pleadings and the entire record we find neither allegation nor proof of any changed circumstances authorizing a change of the custody of the minor children of the parties to this action.

Since we have reached the conclusion that the "dismissed agreed" order of the Law and Equity Court of the City of Richmond, Virginia, is a bar to this action between the same parties for the same cause, in the absence of any allegation or proof of any changed circumstances requiring a change of the custody of the children here involved, the agreement reached by the parties prior to the order of the Virginia Court is still of full force and effect.

The exceptions of the appellant raise other issues which we find unnecessary to decide in view of the conclusion heretofore reached.

It is likewise unnecessary for us to consider the exception of the respondent to the order of the Honorable J. Robert Martin, Jr., granting the motion of the appellant to stay the execution of the order of the Juvenile and Domestic Relations Court of Greenville County.

Reversed.

Taylor, C. J., Legge and Lewis, JJ., concur. Oxner, J., dissents.

OXNER, J. (Dissenting): The Court holds that the consent order of the Virginia Court dismissing the habeas corpus proceedings instituted there after appellant and respondent had reached an agreement as to the custody of their children is a judgment which, under the Full Faith and Credit Clause of the Federal Constitution, precludes the courts of this State, in the absence of any change in [fol. 201] conditions, from inquiring into and determining what is for the welfare and best interests of these children. At the time this agreement was made the marital domicile of the parties was in North Carolina. Appellant continues to be a resident of that State. Under the view taken by the majority of the Court, not only would this order constitute, in the absence of a change in conditions, an adjudication binding on the courts of this State but also on those of North Carolina. I do not agree that it has such effect.

It is generally held that the judgment of a Court of one State as to custody of children must, in the absence of fraud or want of jurisdiction, be given full effect in every other State as to the facts before the Court at the time such judgment was rendered. Hartley v. Blease, 99 S. C. 92, 82 S. E. 991; Annotation 116 A. L. R. 1299. The underlying reason for this was stated by Mr. Justice Frankfurter in a concurring opinion in People of State of New York v. Halvey, 330 U. S. 610, 67 S. Ct. 903, as follows: "The constitutional policy formulated by the Full Faith and Credit Clause cannot be fitted into tight little categories or too abstract generalities. That policy was the nation-wide restriction of litigiousness, to the extent that States, autonomous for certain purposes, should not be exploited to permit repetitive litigation. In substance, the Farmers deemed it against the national welfare for a controversy that was truly litigated in one State to be relitigated in another. Such limitation does not foreclose inquiry into what was litigated and what was adjudicated."

In this proceeding respondent is not seeking to relitigate an issue which has been litigated in Virginia. The merits of the present controversy were never considered nor passed upon in that State. In fact, the agreement made between the parties was never exhibited to the Court. It

follows that the order entered by the Virginia Court was not pronounced in the exercise of its judicial function. Such order, referred to in the Virginia decisions as an order "dismissed agreed", is apparently there regarded as binding on the parties because the courts "cannot change the contract of the parties without their consent." Bardach Iron and Steel Co., Inc. v. Tenenbaum, 136 Va. 163, 118 S. E. 502. This is in accord with the general rule that a judgment or decree, though entered by consent of the parties, is res judicata to the same extent as if entered after contest. Norton v. Planters Fertilizer & Phosphate Co., 206 S. C. 119, 33 S. E. (2d) 247; Annotation 2 A. L. R. (2d) 514. I do not question the soundness of this principle when applied to an ordinary civil action. If this were purely a personal contest between the parties over a legal right, there would exist a basis for holding that the Virginia order is binding. But I do not think it is binding in another State in a proceeding relating to the custody of children. Such a proceeding is not to be judged, nor the results measured, altogether by technical rules that have to do with property rights. Like marriage, the custody of young children is of importance to the State. It is not a property right of the parents. It is stated in 17A Am. Jur., page 31: "If the original award was made casually, pursuant to an agreement of the parties and without a true judicial consideration of the facts, it is proper to consider the facts as they existed at the time the decree was entered in determining whether the order should be modified."

The reasons advanced in the Virginia decisions for the binding effect of an order "dismissed agreed" have no application here. While these parties were at liberty to contract with each other with respect to the custody of their children, such a contract is not binding on the courts. It is always open to judicial inquiry as to whether such agreement is for the best interests of the children. "Parents have no 'property rights', in the ordinary sense of that term, in and to their minor children, and accordingly a parent's right of control or custody of a minor child is not a property right which may be bargained, sold, or otherwise disposed of." 67 C. J. S., page 636. As stated by Mr.

Justice Jackson in his dissenting opinion in May v. Anderson, 345 U. S. 528, 73 S. Ct. 840: "Custody is viewed not with the idea of adjudicating rights *in* the children, as if they were chattels, but rather with the idea of making the best disposition possible for the welfare of the children."

In a case of this kind the rights of the parents are subordinate to the welfare of the children. Graydon v. Graydon, 150 S. C. 117, 147 S. E. 749. While their rights will be duly regarded, the paramount consideration is the best interests of the children. Koon v. Koon, 203 S. C. 556, 28 [fol. 202] S. E. (2d) 89; West v. West, 208 S. C. 1, 36 S. E. (2d) 856; Dillon v. Dillon, 219 S. C. 255, 64 S. E. (2d) 649. This paramount consideration is for determination by the courts and not by the parents. The contract between these parties entered into in Virginia does not under my view preclude the courts of this State from determining the question of custody or as to how custody should be divided between these parties. The children are lawfully in this State and, in my opinion, the question as to whether the agreement made by the parents is for their best welfare is open for judicial determination.

Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 203]

IN THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

PETITION FOR REHEARING

The undersigned attorneys for Barbara D. Ford respectfully submit that the Court in its opinion filed November 15, 1961, overlooked or misapprehended certain facts and legal tenets in holding that the Order of Dismissal rendered by the Law and Equity Court of the City of Richmond, Virginia is entitled to full faith and credit under Article IV, Section 1, of the Constitution of the United States and is res judicata as to the issue involved in this case, in that:

(a) As was held in *Kovacs* v. *Brewer* (N. C.), 97 S. E. (2d) 96, and as indicated by the Virginia Supreme Court

in *Wilson* v. *Wilson* (Va.), 118 S. E. 270, and the United States Supreme Court in *Kovacs* v. *Brewer*, 78 S. Ct. 963, 356 U. S. 660, the Constitution of the United States imposes no restriction upon a State in determining the best welfare of a child:

(b) As was held in *People of State of New York ex rel. Halvey* v. *Halvey*, 67 S. Ct. 903, 330 U. S. 610, the State of the forum has at least as much leeway to disregard a judgment as does the State where it was rendered, and as was held in *Gloth* v. *Gloth*, 154 Va. 511, 153 S. E. 879, discussed at pages 9 and 10 of respondent's brief and cited as authority by the Virginia Supreme Court in *Kern* v. *Lindsey*, 30 S. E. (2d) 707, which was tried in the very Court that rendered the Order of Dismissal in the present case, i.e., the Law and Equity Court of the City of Richmond, "The statute (Code Section 5111—now Section 20-108) expressly gives the Court the continuing jurisdiction to change or modify its decree as to the custody and maintenance of minor children", Section 5111 providing: " • • • the court may make such further decree as it shall deem expedient concerning the • • • care, custody and maintenance of their minor children, and may determine with which of the parents the children or any of them, shall remain; and the court may from time to time afterwards, on petition of either of the parents, revise and alter such decree concerning the care, custody, and maintenance of the children and make a new decree concerning the same, as the circumstances of the parents and the benefit of the children may require; • • • ."

[fol. 204] (c) As stated in the opinion filed herein, in order to make out the defense of res judicata the subject matter must be the same; and such element is not present in the instant case in that the action tried in the Greenville County Juvenile and Domestic Relations Court was an adjudication as to the best interests and welfare of the children, whereas the Order of Dismissal of the Law and Equity Court of the City of Richmond was merely "a declaration of record sanctioned by the judgment of the Court, that the cause of action has been adjusted by the parties themselves, *in their own way;*" and

(d) As stated in the opinion filed herein, changed circumstances may authorize the change of custody of minor children, and the Court may, even on its own motion, upon sufficient showing, make further disposition of the custody of a child, if new facts and circumstances make it necessary or desirable for the child's welfare. The complaint in this case alleges that the plaintiff is the proper person to have custody of the children (F. 16), and the defendant not having served a motion to make more definite and certain, such allegation includes changed circumstances or any other legally sufficient reason; and the record reveals material changes in the plaintiff's circumstances in Richmond, Virginia and Greenville, South Carolina (F. 292, 82) which were recognized by the judge of the Juvenile and Domestic Relations Court and, by implication, by the defendant (F. 93-98).

Respectfully submitted,

Haynsworth, Perry, Bryant, Marion & Johnstone, By: O. G. Calhoun, and Carter & Hill, By: Rex L. Carter, Attorneys for the Respondent Petitioner.

Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 205]

Certificate From Counsel

I, the undersigned, attorney at law, practicing at the Greenville bar, do hereby certify to the following facts:

At the request of counsel for respondent in Barbara D. Ford v. Herman A. Ford (Case No. 4764, Opinion No. 17850, filed November 15, 1961), I have carefully read the transcript, arguments, the opinion of the Court and the petition for rehearing, and have given some study and thought to the decisions therein cited with a view of ascertaining whether or not I could give the opinion required to Rule 17.

I have made a conscientious effort fully to comply with the Court's ideas as to what should be done in such a

matter, by "counsel not concerned in the case", and now give it as my professional opinion that there is merit in the grounds of the petition for rehearing and that same is not intended for any purpose of delay.

J. Wiley Brown, Attorney at Law, Greenville, S. C.

November 24, 1961.

[fol. 206]

IN THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

ORDER DENYING PETITION FOR REHEARING

After careful consideration of the within Petition for Rehearing, we are satisfied that this Court has not overlooked or misapprehended the questions involved in the appeal. The Petition is accordingly denied.

C. A. Taylor, C. J., Lionel K. Legge, A. J., Joseph R. Moss, A. J., J. Woodrow Lewis, A. J.

I think the within Petition for Rehearing should be granted and, therefore, dissent from the foregoing order.

G. Dewey Oxner, A. J.

Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 207] Notice of motion for stay of remittitur with order of court denying same (omitted in printing).

[fol. 208] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 209]

SUPREME COURT OF THE UNITED STATES

No. 663, October Term, 1961

BARBARA D. FORD, Petitioner,

vs.

HERMAN A. FORD.

ORDER ALLOWING CERTIORARI—Filed February 26, 1962

The petition herein for a writ of certiorari to the Supreme Court of the State of South Carolina is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Office Supreme Court, U.S.
FILED
JAN 15 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of The United States

OCTOBER TERM, 1962

No. 62

BARBARA D. FORD, *Petitioner,*

versus

HERMAN A. FORD

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

W. FRANCIS MARION
409 E. North Street
Greenville, South Carolina

O. G. CALHOUN
409 E. North Street
Greenville, South Carolina

REX L. CARTER
Lawyers Building
Greenville, South Carolina
Counsel for Petitioner

CHRISTIAN, BARTON, PARKER & BOYD
Richmond, Virginia

HAYNSWORTH, PERRY, BRYANT, MARION & JOHNSTONE
Greenville, South Carolina
of Counsel

INDEX

Opinion Below	2
Jurisdiction	2
Question Presented	2
Constitutional Provision and Statute Involved	2
Statement	3
Reasons for Granting the Writ	5
Appendix A – Opinion and Decree Below	A 1
Appendix B – Order Denying Rehearing	A 15
Appendix C – Constitutional Provision and Statute Involved	A 16

AUTHORITIES

Cases:	Page
Coleman, et al v. Miller, 307 U. S. 433, 59 S. Ct. 972, 83 L. Ed. 1385	2, 5
Halvey v. Halvey, 330 U. S. 610, 67 S. Ct. 903, 91 L. Ed. 1133	6
Kovacs v. Brewer, 356 U. S. 604, 78 S. Ct. 963, 2 L. Ed. 2d 1008	6
Lynde v. Lynde, 181 U. S. 183, 21 S. Ct. 555, 45 L. Ed. 810	5
May v. Anderson, 345 U. S. 528, 73 S. Ct. 840, 97 L. Ed. 1221	2, 6
Missouri v. Andriano, 138 U. S. 496, 11 S. Ct. 385, 34 L. Ed. 1012	5
Constitutional Provision:	
Article IV, Section 1, *Constitution of the United States*	A 16
Federal Statutes:	
28 USC § 1738 (1948)	A 16
Judiciary Act of 1789, §25	5
28 USC §344(b) (1940)	5
South Carolina Statute:	
Acts and Joint Resolutions of 1954, No. 744, Sec. 27	4

IN THE

Supreme Court of The United States

[redacted]

OCTOBER TERM, 1961

No. .....

BARBARA D. FORD, *Petitioner*,

versus

HERMAN A. FORD

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

Barbara D. Ford, your petitioner, prays that a writ of certiorari issue to review the decree of the Supreme Court of South Carolina, entered in the above-entitled case on November 15, 1961.

OPINION BELOW

The opinion of the Greenville County Juvenile and Domestic Relations Court (R 20-28) and Court of Common Pleas (R 185-191) were not reported. The opinion of the South Carolina Supreme Court, *Ford v. Ford*, S. C. Sup. Ct., Nov. 15, 1961, which has not yet been reported, is printed in Appendix A. *infra*, pp. A 1-15.

JURISDICTION

The decree of the South Carolina Supreme Court, the highest court of the State, was filed on November 15, 1961 and petition for rehearing was denied on December 11, 1961, (*infra*, Appendix B, p. A 15), whereby the petitioner has no further appellate remedy under the laws of the State of South Carolina.

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. §1257 (3). Jurisdiction is believed to be sustained by the case of *Coleman, et al. v. Miller*, 307 U.S. 433 (1939) and *May v. Anderson*, 345, U.S. 528 (1953).

The petitioner's motion in the South Carolina Supreme Court for stay of remittitur was denied; but her subsequent motion in this Court dated December 15, to which the respondent filed memorandum in opposition dated December 21, 1961, was granted by order of Mr. Justice Frankfurter, dated December 22, 1961.

QUESTION PRESENTED

Does Article IV, Section 1 of the Constitution of the United States require the courts of the State of South Carolina to give full faith and credit to a consent order of dismissal of a habeas corpus proceeding in the State of Virginia so as to preclude the South Carolina court from considering the best interests of minor children, in an action for their custody between their mother and father?

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The pertinent Constitutional provision, Article IV, Section 1, and statute, 28 U.S.C. §1738, are set out in Appendix C, infra, p. A 16.

STATEMENT

On August 10, 1960 the petitioner instituted this action seeking custody of the three minor children of the petitioner and the respondent, the children then being three, five and seven years of age. The action was instituted in the Greenville County Juvenile and Domestic Relations Court which has exclusive jurisdiction of such matters.

The petitioner alleged that it was for the best interests of the minor children, who were then residing with the petitioner in Greenville County, South Carolina, that their custody be awarded to her, and, further, that the respondent had been guilty of misconduct and was an unfit person to have custody of the children. The respondent answered in the form of a general denial and affirmatively alleged that the respondent was entitled to the custody of the children by reason of a private agreement between the petitioner and respondent entered into in Richmond, Virginia, and a prior order of dismissal of a habeas corpus proceeding which had been instituted by the respondent in the Law and Equity Court of the City of Richmond, Virginia (R 9). Certified copies of the proceeding in the Law and Equity Court of the City of Richmond, Virginia and the correspondence between the attorneys for the parties forming the basis of the aforesaid agreement were incorporated by reference into the answer and filed in the Juvenile and Domestic Relations Court (R 11-20).

Upon trial of the case the Juvenile and Domestic Relations Court found that it was in the best interest of the children that their custody be with the petitioner and that the order of dismissal of the Law and Equity Court of the City of Richmond, Virginia was not res judicata, for the reasons that the order was a mere order of dismissal containing no finding of fact, conclusions of law, or incorporation by reference of any written instrument or letter (the private agreement not even having been disclosed to the Virginia Court); it was not a dismissal with prejudice, and that there was no adjudication of the best welfare of the children (R 25). The Court, therefore, awarded custody of the children to the pe-

titioner with reasonable visitation rights to the respondent including holidays and school vacation periods, to be agreed upon by the parties.

Upon appeal to the Greenville County Court of Common Pleas the respondent herein assigned as error, among others, the failure to hold that the aforesaid consent order of dismissal of the Law and Equity Court of Richmond, Virginia was binding and res judicata (R 37). In accordance with the South Carolina statute[1] the appeal was heard on the law and the facts as established by the record; and the judge of the Court of Common Pleas affirmed the trial judge, and held that the order of dismissal of the Law and Equity Court of Richmond, Virginia was not res judicata (R 188). The decision of the trial judge was modified only to the extent that the respondent would have custody of the children during specified holiday periods rather than visitation rights during such periods to be agreed upon by the parties.

The respondent herein then appealed to the South Carolina Supreme Court, again assigning error in the failure of the lower courts to hold that the order of dismissal of the Law and Equity Court of the City of Richmond, Virginia was entitled to full faith and credit and was res judicata to the issues involved in the present action (R 191). By the majority opinion of the South Carolina Supreme Court filed November 15, 1961, (Mr. Justice Oxner dissenting), it was held that the order of the Law and Equity Court of the City of Richmond, Virginia was an order "dismissed agreed" constituting a judgment on the merits barring another action for the same cause in Virginia; and that under Article IV, Section 1 of the Constitution of the United States, the South Carolina court was required to give full faith and credit (Appendix A, pp. A 1-15).

Within due time a petition for rehearing was filed in the South Carolina Supreme Court, which was refused, Mr. Justice Oxner again dissenting (Appendix B, p. A 15).

---

[1]Acts and Joint Resolutions of S. C., 1954, No. 744, Sec. 27.

REASONS FOR GRANTING THE WRIT

As indicated by the refusal of the South Carolina Supreme Court to grant the petitioner's motion for stay of remittitur and by the "Memorandum of Respondent in Opposition to Application to Stay Enforcement of Decree of the Supreme Court of the State of South Carolina" filed in this Court on December 21, 1961 there appears to be a need for clarification of the jurisdiction of this Court to review decisions of State courts involving claims of federal right, *i.e.*, in this instance, full faith and credit, when such claim is by the state court sustained rather than denied. Misapprehension no doubt results from the fact that the original Judiciary Act of 1789, Section 25[1] provided for review only where the claim of federal right had been denied, and the decisions of this Court that a federal question does not exist when full faith and credit has been sustained, such as *Lynde v. Lynde*, 181 U.S. 183 (1901) and *Missouri v. Andriano*, 138 U.S. 496 (1891). These decisions all preceded the Act of December 23, 1914[2] and the subsequent 28 *U.S.C.* §344 (b) and present 28 *U.S.C.* §1257 (3) derived therefrom, which expressly provided that this Court may exercise jurisdiction as well where the Federal claim is sustained as where it is denied. *Coleman v. Miller*, 307, U. S. 433, 443 (1939).

From the standpoint of the petitioner and, more important, her children, the decision of the South Carolina Supreme Court that it was bound by the order of dismissal of the Law and Equity Court of the City of Richmond, Virginia whereby the private agreement of the parties, which was not disclosed to that court, remained in force and effect, should be reviewed as it has the effect of placing custody of the three children of tender years with their father during most of the year; whereas both of the courts in which the best interests of the children were considered and adjudged, *i.e.*, the Greenville County Juvenile and Domestic Relations Court and the Court of Common Pleas, held that such custody should

[1] 1 Stat. 73, 85, 86.
[2] 38 Stat. 790.

be with their mother, the petitioner herein. Aside from the manifest injustice of this result, the petitioner believes that this decision of a federal question by the South Carolina Supreme Court is not in accord with the applicable decisions of this Court as expressed in *Kovacs v. Brewer*, 356 U.S. 604 (1958); *Halvey v. Halvey*, 330 U. S. 610 (1947); and *May v. Anderson*, 345 U. S. 528 (1953).

A third and perhaps most important consideration is the precident that will have been set, binding upon the courts of South Carolina and persuasive authority in similar situations in the courts of Virginia when a prior order of dismissal of a South Carolina court is involved. The jurisdiction of courts as to matters of custody, although properly invoked, would thereby be, in effect, defeated or divested by a prior private agreement when, as in this instance, the agreement had not previously been revealed to any court and when revealed was found not to have been in the best interests of the children. Such anomalous result is not, we submit, intended in our system of jurisprudence and should not be allowed to stand as a precident.

The petitioner, therefore, prays that a writ of certiorari issue to the Supreme Court of South Carolina.

Respectfully submitted,

W. FRANCIS MARION
409 E. North Street
Greenville, South Carolina

O. G. CALHOUN
409 E. North Street
Greenville, South Carolina

REX L. CARTER
Lawyers Building
Greenville, South Carolina

Counsel for Petitioner

CHRISTIAN, BARTON, PARKER & BOYD
Richmond, Virginia

HAYNSWORTH, PERRY, BRYANT, MARION & JOHNSTONE
Greenville, South Carolina
of Counsel

APPENDIX A

Opinion Below.

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Barbara D. Ford, *Respondent*,

vs.

Herman A. Ford, *Appellant*

MOSS, A. J.: Barbara D. Ford, the respondent herein, and Herman A. Ford, the appellant herein, were married on March 16, 1952, in Richmond, Virginia. Three children were born of this marriage and they were at the time of the institution of this action seven, five and three years of age, respectively.

The respondent did, on August 10, 1960, commence this action in the Greenville County Juvenile and Domestic Relations Court seeking custody of the three minor children of the marriage. The complaint alleged that the children were residing with the respondent in Greenville County, South Carolina, and that it was for the best interest of the said minor children that their custody be awarded to her. It is further alleged that the appellant had been guilty of misconduct and was an unfit person to have custody of the said children. The answer of the appellant alleges that the appellant and respondent are living separate and apart on account of the misconduct of the respondent. It is further alleged that the respondent is not a fit or proper person to have the custody of the said minor children by reason of her misconduct. The answer further alleges that the appellant is entitled to the custody of the said minor children of the marriage, he being a fit and proper person to have such custody and is financially able to provide for the education, maintenance and support of the said children in a comfortable and desirable home in Sanford, North Carolina.

The answer further alleges that the appellant and respondent separated on August 25, 1959, and the respondent

went to the home of her mother in Richmond, Virginia, the children remaining in North Carolina in the custody of the appellant. It is further alleged that on August 27, 1959, that the respondent took the children of the marriage from the State of North Carolina to the home of her mother in Richmond, Virginia. It is further alleged that on August 28, 1959, the appellant did, in the Law and Equity Court of the City of Richmond, Virginia, file a petition for a Writ of Habeas Corpus directing the respondent to produce the bodies of the three children before the Court at a time and place to be specified and to do and receive what shall then and there be considered by the Court concerning said children, and that the care, custody and possession of the said children be awarded to the appellant. An Order awarding a Writ of Habeas Corpus was issued by the Law and Equity Court of Richmond, Virginia, on August 28, 1959, directing the respondent to have and produce the bodies of the said children before the Court on September 2, 1959, and to abide the direction of the Court as to the custody of said children. The respondent filed a Return to the Writ of Habeas Corpus alleging that she was a fit and proper person to have the custody of the said infant children. She asked that the Writ be discharged as having been improvidently issued without probable cause.

The answer of the appellant further alleged that during the pendency of the Habeas Corpus proceeding in the Law and Equity Court of the City of Richmond, Virginia, both parties being represented by competent legal counsel, an agreement was reached concerning the children of the marriage. Under the terms of the agreement, the appellant was given custody of the three children with the right to the respondent to have custody of the three children during the summer vacation from school and certain holiday periods. Upon the consummation of the aforesaid agreement reached between the parties, a "Consent Dismissal" was had of the Habeas Corpus proceeding instituted by the appellant. The Order of Dismissal by the Law and Equity Court of the City of Richmond, Virginia, filed November 18, 1959, was as follows:

> "It being represented to the court by counsel that the parties hereto have agreed concerning the custody of the infant children, it is ordered that this case be dismissed."

The instant case was tried before the Honorable J. Wilbur Hicks, Judge of the Greenville County Juvenile and Domestic Relations Court, and on December 8, 1960, he issued his order awarding the custody of the children to the respondent, with the provision that the appellant "shall have reasonable visitation rights and these shall include some holidays and school vacation periods and are to be agreed upon by the parties." The appellant duly excepted to the order of the Judge of the Juvenile and Domestic Relations Court and alleged error, *inter alia*, (1) That the Judge erred in failing to hold that the agreement previously made between the parties, through their respective counsel, at a time when an action was pending in the Law and Equity Court of the City of Richmond, Virginia, determined the question of custody and was binding upon the parties. It was asserted that the respondent admitted the making of such agreement and acknowledged that she was represented in such proceeding by able and competent counsel. It was further alleged as error that the court failed to hold that the agreed Order of Dismissal of the Law and Equity Court of the City of Richmond, Virginia, was *res judicata* as to the issue of custody before this Court. (2) That the Judge erred in failing to hold that the said agreement between the parties and the aforesaid agreed Order of Dismissal was binding and *res judicata*. It was further submitted that the Juvenile and Domestic Relations Court of Greenville County must recognize, in accordance with the full faith and credit clause of the Constitution of the United States, the agreed Order of Dismissal of the Virginia Court and that such was *res judicata*, unless there was evidence of subsequent misconduct on the part of the appellant or a change of conditions warranting a change of the custody of the children. (3) That the Judge erred in awarding the custody of the children to the respondent and giving the

appellant only visitation rights to be agreed upon by the parties.

The appeal from the order of the Judge of the Juvenile and Domestic Relations Court of Greenville County was heard by the Honorable John Grimball, presiding Judge, on January 9, 1961, at a special Equity term of the Court of Common Pleas for Greenville County, South Carolina.

By an order dated February 25, 1961, the presiding Judge overruled the provision of the order of the Juvenile and Domestic Relations Court to the extent that he awarded the custody of the three minor children jointly to the respondent and the appellant, placing the custody of the said children in the respondent during the normal school year, commencing in September and ending in the early part of June of each year. He awarded custody of the three minor children to the appellant during the normal school holiday months, commencing in the early part of June and ending in the early part of September of each year. This order provided further that the appellant should have the custody and control of the children during the normal Christmas holidays of each school year. It was further provided that during the time that either the respondent or appellant had custody, the other party should be permitted to see or visit with the children at reasonable times and places. The presiding Judge refused to hold as *res judicata* the custody agreement reached by and between the parties, as a result of which the Habeas Corpus proceeding instituted by the appellant in the Law and Equity Court of the City of Richmond, Virginia, for the purpose of obtaining a custody of the minor children of the parties, was dismissed. He likewise refused to give full faith and credit to the agreed dismissal order of the Virginia Court Within due time the appellant gave notice of intention to appeal to this Court from the order of the lower Court.

The appellant asserts that the trial Judge erred in refusing to hold as *res judicata* the "Consent Dismissed" order of the Law and Equity Court of the City of Richmond, Virginia, which was made after the parties to this action had reached

an agreement concerning the custody of the infant children here involved.

It is provided in Article IV, Section 1, of the Constitution of the United States, that:

> "Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

In the case of *Hamilton v. Patterson*, 236 S. C. 487, 115 S. E. (2d) 68, this Court said:

> "° ° ° Where a judgment rendered by a court having jurisdiction of the cause and the parties is challenged in another State, 'the full faith and credit clause of the Constitution precludes any inquiry into the merits of the cause of action, the logic or consistency of the decision, or the validity of the legal principles on which the judgment is based.' *Milliken v. Meyer*, 311 U. S. 457, 61 S. Ct. 339, 342, 85 L. Ed. 278. Because there is a full faith and credit clause a defendant may not a second time challenge the validity of the plaintiff's right which has ripened into a judgment.' *Magnolia Petroleum Co. v. Hunt*, 320 U. S. 430, 64 S. Ct. 208, 214; 88 L. Ed. 149, 150 A. L. R. 413.
>
> "This clause of the *Federal Constitution U. S. Const.* art. 4, section 1 and the *Act of Congress* which implements it 'require the judgments of the courts of one State to be given the same faith and credit in another State as they have by law or usage in the courts of the State rendering them.' *Morris v. Jones*, 329 U. S. 545, 67 S. Ct. 451, 454, 91 L. Ed. 488, 168 *A. L. R.* 656."

In order to make out the defense of *res judicata*, the following elements must be shown: (1) The parties must be the same or their privies; (2) The subject matter must be the same; and (3) While generally the precise point must be ruled, yet where the parties are the same or are in privity, the judgment is an absolute bar not only of what was decided

but what might have been decided. *Mackey v. Frazier*, 234 S. C. 81, 106 S. E. (2d) 895.

What was the effect of the agreed order under the Virginia Law and which came about as a result of a custody agreement reached between the parties with the advice and consent of their counsel? Does an agreed order of dismissal under the Virginia practice put an end to a pending suit and bars any subsequent suit on the same cause of action between the same parties? In the case of *Bardach Iron & Steel Co., Inc. v. Tenenbaum*, 136 Va. 163, 118 S. E. 502, the effect of an order "dismissed agreed" is fully discussed. The order there involved was "on motion of the plaintiff and with the consent of the defendant, this cause is dismissed agreed." The Virginia Court in discussing the effect of such order, said:

> "Ordinarily, the records of a court of record remain in the breast of the court, and subject to change or alteration by the court during the term at which they are made, but an order 'dismissed agreed' is an exception to the general rule. The court has no power to make such a record except by consent of the parties, and, having obtained such consent and made the entry, it is equally without power to set it aside without the consent of both parties, except upon some ground that would warrant the setting aside of other contracts of like nature. It is a contract of record that the court is without power to disturb except as stated. The court may correct its own errors, but cannot change the contracts of parties without their consent. *Deaver v. Jones*, 114 N. C. 649, 19 S. E. 637; *Hammond v. Place*, Har. (Mich.) 438. If the trial court was without power to set aside the order 'dismissed agreed' made on December 8, 1921, that was an end of the case. Such an order not only puts an end to the pending suit, but is a bar to any subsequent suit on the same cause of action, between the same parties, as fully as a retraxit would be.
>
> "'It is a declaration of record sanctioned by the judgment of the court, that the cause of action has been adjusted by the parties themselves, in their own way.' *Hoover v. Mitchell*, 25 Grat. (66 Va.) 387, 388;

Wohlford v. Compton, 79 Va. 333; *Siron v. Ruleman*, 32 Grat. (73 Va.) 215, 223; *Jarboe v. Smith*, 10 B. Mon. (Ky.) 257, 52 Am. Dec. 541; *U. S. v. Parker*, 120 U. S. 89, 7 Sup. Ct. 454, 30 L. Ed. 601; *Simmons v. Yoho* (W. Va.) 115 S. E. 851, 857; 1 *Freeman on Judgments*, sec. 262; 2 *Black on Judgments*, sec. 706.

"In *Jarboe v. Smith*, 10 B. Mon. (Ky.) 257, 52 Am. Dec. 541, it is said to be a bar between the parties on the original cause of action, unless there is an express stipulation that another suit may be brought. In the judgment entered in *Hoover v. Mitchell, supra*, it is said that the dismissal of a suit agreed, without any explanation or qualification showing a contrary intention, is at least a prima facie determination of the matter controverted in that suit, but the opinion in the case holds that 'dismissed agreed' is equivalent to a retraxit. But to have this effect there must have first been an unqualified agreement that the suit should be 'dismissed agreed.'"

In the case of *Murden v. Wilbert, et al.*, 189 Va. 358, 53 S. E. (2d) 42, it was held that the judgment of a court of competent jurisdiction dismissing a suit agreed, upon the ground that it had been agreed by the parties, is a final determination, as to those parties, of the matters litigated in that suit. It was further held that an order "dismissed agreed" is a contract of record that the court is without power to disturb except with consent of the parties.

In the case of *Hinton v. Norfolk & W. Ry. Co.*, 137 Va. 605, 120 S. E. 135, it appears that there was a mutual agreement to settle an action brought by an infant, by his next friend, by payment of the demand in full and was reported to the court and a motion was made by plaintiff to dismiss such action. The order stated that the action was "dismissed settled". The Court said:

"• • • Every distinguishing feature of a case 'dismissed agreed' appears, for there is the mutual agreement to terminate the case, which is reported to the court, and the consequent motion by the plaintiff to dismiss it. The consequences of such a dismissal are well understood and constitute a bar to

a subsequent action between the same parties for the same cause.

"It is sufficient to cite the recent case of *Bardach I. & S. Co., Inc. v. Tenenbaum*, 136 Va. 163, 118 S. E. 502."

In the case of *Virginia Concrete Co. v. Board of Supervisors*, 197 Va. 821, 91 S. E. (2d) 415, the Virginia Court said:

> "A retraxit is a voluntary renunciation by the plaintiff in open court of his suit and the cause thereof, and by it he forever loses his action. 6 *Mich. Jur., Dismissal*, etc., sec. 35, p. 244; *Burks Pl.* Pr., 4 ed., sec. 337, p. 646.
>
> "An order 'dismissed agreed' not only puts an end to the pending suit, but is a bar to any subsequent suit on the same cause of action by the same parties 'as fully as a retraxit would be.' *Bardach Iron & Steel Co. v. Tenenbaum*, 136 Va. 163, 171, 118 S. E. 502, 505."

In this same Virginia Concrete Co. case it was further held that a dismissal order, even in general terms, which does not contain any reservation of right of either party to sue thereafter, is *res judicata* with respect to all matters covered by the pleadings of the case. The Court said:

> "In *Wilcher v. Robertson*, 78 Va. 602, 618, it is likewise said that 'an order simply dismissing the suit is not a determination on the merits, and so is not a bar to the maintenance of a second suit for the same cause of action.' But in the earlier case of *Taylor v. Yarbrough*, 13 Grat. 183, 194, 54 Va. 183, 194, it was held that a decree which dismissed a bill in general terms and without any specification of grounds therefor, or reservation of a right to sue thereafter, must be taken to rest upon all the issues presented by the pleadings and regarded as a final judgment of the entire right asserted. Much depends on the stage of the proceedings at which the order was entered and the reason for its entry. It is well, therefore, to heed the admonition in *Lile's Equity Pl. & Pr.*, 3d ed., sec. 273, p. 157, that where the plaintiff voluntarily dismisses his suit or when it is dis-

> missed involuntarily for reasons not affecting the merits of the case, the order should recite that the dismissal is 'without prejudice to plaintiff's right to institute such further suits concerning the same matter as he may be advised,' in order to avoid a plea of *res judicata* in future litigation. See also *Newberry v. Ruffin*, 102 Va. 73, 76, 45 S. E. 733."

The North Carolina case of *Steele v. Beaty, et al.*, 215 N. C. 680, 2 S. E. (2d) 854, was an action to recover damages for personal injuries alleged to have been caused by an assault by the defendants. The defendants pleaded settlement and a judgment in a former action based on the same cause of action. It appears that when the settlement was made that the order provided "Upon motion and by consent it is agreed that said action be, and the same is hereby dismissed." A judgment was rendered for the plaintiff and an appeal was prosecuted by the defendants. In reversing the judgment of the lower Court, the Supreme Court of North Carolina held that a "judgment of dismissal" entered by agreement of the parties pursuant to a compromise and settlement of the controversy is a judgment on the merits barring any other action for the same cause. It was further held that a "judgment in retraxit" is usually based upon and follows a settlement out of court, and like a judgment on the merits is a bar and estops plaintiff from again proceeding in another suit on the same cause of action. It was also held that the legal effect of an order dismissing a suit agreed is to bar any other suit between the same parties on the original cause of action, thus adjusted by them and merged in the judgment of the court, rendered at their instance, and in consequence of the agreement. We quote the following from this case:

> "To hold that a judgment of dismissal by consent is not a bar would deny any effect whatever to the agreement of the parties and would treat the judgment of dismissal merely as a voluntary act of of the plaintiff. *Doan v. Bush*, 130 Ark. 566, 198 S. W. 261, L. R. A. 1918B, 523. The legal deduction to be drawn from a judgment dismissing a suit by agreement of the parties is that the parties had by

their agreement adjusted the subject matter of the controversy in that suit; and the legal effect of such a judgment is, therefore, that it will operate as a bar to any other suit between the same parties on the identical cause of action then adjusted by them and merged in the judgment therein rendered at their instance and in consequence of their agreement."

In the case of *Yancey v. Yancey*, 230 N. C. 719, 55 S. E. (2d) 468, the husband brought an action against his wife to establish a resulting trust in realty. A previous action for the same cause had been dismissed and judgment entered "that the matters and things in controversy have been settled between the parties," and that, therefore, it was "adjudged and decreed that the plaintiff be nonsuited." The lower Court held that the previous judgment for the same cause, nonsuiting the plaintiff and reciting that the matters involved had been settled between the parties, was a bar to this action, citing the case of *Steele v. Beaty, et al., supra*. The Supreme Court of North Carolina affirmed the judgment of the lower Court. In the opinion, it is stated that the plaintiff admits the previous order above quoted. It is further stated that the plaintiff did not allege fraud, nor did he attack the judgment nor seek to vacate it. The Court said:

"• • • Hence standing upon the docket it is a judgment of retraxit, and it bars a new action. Before he can prosecute another action for the same cause he must in some proper way remove this judgment from his pathway. *Moody v. Wike*, 170 N. C. 541, 87 S. E. 350; *Fowler v. Fowler*, 190 N. C. 536, 130 S. E. 315; *McIntosh Prac. & Pro.* 745."

In the West Virginia case of *In Re McIntosh's Estate*, 109 S. E. (2d) 153, the Supreme Court of Appeals of the State, said:

"• • • A judgment recording a compromise settlement and dismissing the action 'settled and agreed' is sufficient on which to found a res judicata plea. *Central Trust Co. v. Harless*, 108 W. Va. 618, 152

S. E. 209; *Murden v. Wilbert*, 189 Va. 358, 53 S. E. (2d) 42; 50 *C. J. S. Judgments*, sec. 634."

A review of the cases decided in Virginia convinces us that the Order of Dismissal by the Law and Equity Court of the City of Richmond, Virginia, was a "dismissed agreed" one because it appears upon the face of the order that there was a settlement between the parties concerning the custody of the infant children and there was a mutual agreement to terminate the case. Such a judgment of dismissal entered by agreement of the parties, pursuant to a compromise or settlement of the controversy, is a judgment on the merits, barring another action for the same cause and is equivalent to a judgment of retraxit. If the respondent here had instituted in the Courts of Virginia the action commenced by her in the Courts of this State, the appellant could have successfully interposed a plea of *res judicata* as a defense to said action. Since the judgment entered in the Virginia Court by agreement or consent is *res judicata* in that State, it is *res judicata* and entitled to full faith and credit in this State. We are required under Art. IV, Sec. 1 of the Constitution of the United States to give the same faith and credit in this State to the "dismissed agreed" order or judgment as "by law or usage" the Courts of Virginia would give to such order or judgment.

It is undisputed that the parties in the Virginia proceeding are the same as the parties here. The issue before the Court in Virginia and in the Court here was which of the parties should have the custody of the three minor children. There is, therefore, an identity of parties and subject matter.

We should point out that we have held in a number of cases that changed circumstances may authorize the change of custody of minor children. We have held that the Court may at any time on the application of any interested party, or even on its own motion, upon sufficient showing, make further disposition of the custody of a child, if new facts and circumstances make it necessary or desirable for the child's welfare. A judicial award of the custody of a child is never final. *Ex Parte Atkinson*, 238 S. C. 521, 121 S. E. (2d) 4. Applying

this rule to the instant case and after examining the pleadings and the entire record we find neither allegation nor proof of any changed circumstances authorizing a change of the custody of the minor children of the parties to this action.

Since we have reached the conclusion that the "dismissed agreed" order of the Law and Equity Court of the City of Richmond, Virginia, is a bar to this action between the same parties for the same cause, in the absence of any allegation or proof of any changed circumstances requiring a change of the custody of the children here involved, the agreement reached by the parties prior to the order of the Virginia Court is still of full force and effect.

The exceptions of the appellant raise other issues which we find unnecessary to decide in view of the conclusion heretofore reached.

It is likewise unnecessary for us to consider the exception of the respondent to the order of the Honorable J. Robert Martin, Jr. granting the motion of the appellant to stay the execution of the order of the Juvenile and Domestic Relations Court of Greenville County.

Reversed.

TAYLOR, C. J., LEGGE and LEWIS, JJ., concur. OXNER, J., dissents.

OXNER, J. (Dissenting): The Court holds that the consent order of the Virginia Court dismissing the habeas corpus proceedings instituted there after appellant and respondent had reached an agreement as to the custody of their children is a judgment which, under the Full Faith and Credit Clause of the Federal Constitution, precludes the courts of this State, in the absence of any change in conditions, from inquiring into and determining what is for the welfare and best interests of these children. At the time this agreement was made the marital domicile of the parties was in North Carolina. Appellant continues to be a resident of that State. Under the view taken by the majority of the Court, not only would this

order constitute, in the absence of a change in conditions, an adjudication binding on the courts of this State but also on those of North Carolina. I do not agree that it has such effect.

It is generally held that the judgment of a Court of one State as to custody of children must, in the absence of fraud or want of jurisdiction, be given full effect in every other State as to the facts before the Court at the time such judgment was rendered. *Hartley v. Blease*, 99 S. C. 92, 82 S. E. 991; Annotation 116 A. L. R. 1299. The underlying reason for this was stated by Mr. Justice Frankfurter in a concurring opinion in *People of State of New York v. Halvey*, 330 U. S. 610, 67 S. Ct. 903, as follows: "The constitutional policy formulated by the Full Faith and Credit Clause cannot be fitted into tight little categories or too abstract generalities. That policy was the nation-wide restriction of litigiousness, to the extent that States, autonomous for certain purposes, should not be exploited to permit repetitive litigation. In substance, the Framers deemed it against the national welfare for a controversy that was truly litigated in one State to be relitigated in another. Such limitation does not foreclose inquiry into what was litigated and what was adjudicated."

In this proceeding respondent is not seeking to relitigate an issue which has been litigated in Virginia. The merits of the present controversy were never considered nor passed upon in that State. In fact, the agreement made between the parties was never exhibited to the Court. It follows that the order entered by the Virginia Court was not pronounced in the exercise of its judicial function. Such order, referred to in the Virginia decisions as an order "dismissed agreed", is apparently there regarded as binding on the parties because the courts "cannot change the contract of the parties without their consent." *Bardach Iron and Steel Co., Inc. v. Tenenbaum*, 136 Va. 163, 118 S. E. 502. This is in accord with the general rule that a judgment or decree, though entered by consent of the parties, is res judicata to the same extent as if entered after contest. *Norton v. Planters Fertilizer & Phosphate Co.*,

206 S. C. 119, 33 S. E. (2d) 247; Annotation 2 A. L. R. (2d) 514. I do not question the soundness of this principle when applied to an ordinary civil action. If this were purely a personal contest between the parties over a legal right, there would exist a basis for holding that the Virginia order is binding. But I do not think it is binding in another State in a proceeding relating to the custody of children. Such a proceeding is not to be judged, nor the results measured, altogether by technical rules that have to do with property rights. Like marriage, the custody of young children is of importance to the State. It is not a property right of the parents. It is stated in 17A *Am. Jur.*, page 31: "If the original award was made casually, pursuant to an agreement of the parties and without a true judicial consideration of the facts, it is proper to consider the facts as they existed at the time the decree was entered in determining whether the order should be modified."

The reasons advanced in the Virginia decisions for the binding effect of an order "dismissed agreed" have no application here. While these parties were at liberty to contract with each other with respect to the custody of their children, such a contract is not binding on the courts. It is always open to judicial inquiry as to whether such agreement is for the best interests of the children. "Parents have no 'property rights', in the ordinary sense of that term, in and to their minor children, and accordingly a parent's right of control or custody of a minor child is not a property right which may be bargained, sold, or otherwise disposed of." 67 *C. J. S.*, page 636. As stated by Mr. Justice Jackson in his dissenting opinion in *May v. Anderson*, 345 U. S. 528, 73 S. Ct. 840: "Custody is viewed not with the idea of adjudicating rights *in* the children, as if they were chattels, but rather with the idea of making the best disposition possible for the welfare of the children."

In a case of this kind the rights of the parents are subordinate to the welfare of the children. *Graydon v. Graydon*, 150 S. C. 117, 147 S. E. 749. While their rights will be duly regarded, the paramount consideration is the best interests

of the children. *Koon v. Koon*, 203 S. C. 556, 28 S. E. (2d) 89; *West v. West*, 208 S. C. 1, 36 S. E. (2d) 856; *Dillon v. Dillon*, 219 S. C. 255, 64 S. E. (2d) 649. This paramount consideration is for determination by the courts and not by the parents. The contract between these parties entered into in Virginia does not under my view preclude the courts of this State from determining the question of custody or as to how custody should be divided between these parties. The children are lawfully in this State and, in my opinion, the question as to whether the agreement made by the parents is for their best welfare is open for judicial determination.

APPENDIX B

Order Denying Rehearing

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Barbara D. Ford, *Respondent*,
Herman A. Ford, *Appellant*

After careful consideration of the within Petition for Rehearing, we are satisfied that this Court has not overlooked or misapprehended the questions involved in the appeal. The Petition is accordingly denied.

s/ C. A. Taylor, C. J.
s/ Lionel K. Legge, A. J.
s/ Joseph R. Moss, A. J.
s/ J. Woodrow Lewis, A. J.

I think the within Petition for Rehearing should be granted and, therefore, dissent from the foregoing order.

s/ G. Dewey Oxner, A. J.

APPENDIX C

CONSTITUTIONAL PROVISION INVOLVED

Article IV.—States—Reciprocal Relationship Between States and With United States

Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Statute Involved

Title 28 § 1738. State and Territorial Statutes and Judicial Proceedings; Full Faith and Credit

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any State, Territory, or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken. June 25, 1948, c. 646, 62 Stat. 947.

Office-Supreme Court, U.S.
FILED
FEB 5 1962
JOHN F. DAVIS, CLERK

Supreme Court of The United States

OCTOBER TERM, 1962

No. 63

BARBARA D. FORD,
Petitioner,

vs.

HERMAN A. FORD,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

JOHN S. DAVENPORT, III
ANGUS H. MACAULAY, JR.
DENNY, VALENTINE & DAVENPORT
1300 Travelers Building
Richmond 19, Virginia

WESLEY M. WALKER
LEATHERWOOD, WALKER, TODD & MANN
P. O. Box 1589
Greenville, South Carolina
Attorneys for Respondent

SUBJECT INDEX

	Page
Opinion Below	1
Question Presented	1
Statement of the Case	2
Argument	
No Federal Question of Substance Is Involved In This Case Which Would Justify Review By This Court	6
A. The "Dismissed Agreed" Order of the Virginia Court Was Res Judicata and Was Not Subject to Modification in Virginia under the Circumstances	6
B. The Decision of the Supreme Court of South Carolina Is in Accord with the Decisions of this Court	8
Conclusion	10

TABLE OF CASES AND AUTHORITIES

CASES:	Page
Andrews v. Geyer, 200 Va. 107, 104 S.E. 2d 747 (1958)	7
Bardach Iron & Steel Co. v. Tenenbaum, 136 Va. 163, 118 S.E. 502 (1923)	6
Campbell v. Campbell, 203 Va. 61, 122 S.E. 2d 658 (1961)	6
Darnell v. Barker, 179 Va. 86, 18 S.E. 2d 271 (1942)	7
Kovacs v. Brewer, 356 U.S. 604, 78 Sup. Ct. 963, 2 L. Ed. 2d 1008 (1958)	8, 9
Martin v. Martin, 167 Va. 206, 188 S.E. 148 (1936)	6
May v. Anderson, 345 U.S. 528, 73 Sup. Ct. 840, 97 L. Ed. 1221 (1953)	8, 9, 10
New York ex rel. Halvey v. Halvey, 330 U.S. 610, 67 Sup. Ct. 903, 91 L. Ed. 1133 (1947)	8, 10
Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 75 Sup. Ct. 614, 99 L. Ed. 897 (1955)	10
Semmes v. Semmes, 201 Va. 117, 109 S.E. 2d 545 (1959)	6, 7
Virginia Concrete Co. v. Board of Supervisors, 197 Va. 821, 91 S.E. 2d 415 (1956)	6

OTHER AUTHORITIES:	
Harlan, *Manning the Dikes—Some Comments on the Statutory Certiorari Jurisdiction and Jurisdictional Statement Practice of the Supreme Court of the United States*, 13 Record of N.Y.C.B.A. 541 (1958)	10
Rule 19-1(a), Supreme Court of the United States	10

Supreme Court of The United States

OCTOBER TERM, 1961

No. 663

BARBARA D. FORD,

Petitioner,

vs.

HERMAN A. FORD,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

OPINION BELOW

An unofficial report of the opinion of the Supreme Court of South Carolina in *Ford v. Ford* (Case No. 4764, Opinion No. 17850, Filed November 15, 1961), below, may be found in 123 S.E. 2d 33 (1961).

QUESTION PRESENTED

The "Question Presented" as stated in the petition for certiorari is incomplete because it fails to describe accurately the nature of the order of the Virginia court. Completely stated such question should be:

Is a "dismissed agreed" order of a Virginia court in a custody proceeding entitled to full faith and credit in another state (as held by the Supreme Court of South Caro-

lina) when the Virginia order (*i*) admittedly was res judicata in Virginia, (*ii*) admittedly was not subject to any jurisdictional defects, and (*iii*) admittedly was not subject to modification in Virginia since there was no allegation or proof of any changed circumstances authorizing a change in the custody of the minor children?

STATEMENT OF THE CASE

This litigation actually began in Virginia during the summer of 1959. At that time Respondent discovered that Petitioner, his wife, was having sexual relations with a married man of Richmond, Virginia. This behavior was later admitted by Petitioner (R. 70-71, 86-93).

A separation of Petitioner and Respondent followed, and, in order to obtain custody of his three children who were with Petitioner in Richmond, Virginia, Respondent instituted a habeas corpus proceeding on August 28, 1959, in the Law & Equity Court of the City of Richmond, Virginia. In his petition Respondent alleged that Petitioner had "been guilty of acts which were not only of a nature that would justify . . . [Respondent's] seeking a divorce from her but which render her unfit to have the custody of . . . [their] children." In such petition Respondent also alleged that "the best interests of said children would be promoted by them being forthwith returned to the care, custody and control of . . . [Respondent]" (R. 15-18).

On September 2, 1959, Petitioner filed her return in which she alleged that she was and had been "a fit and proper person to have custody of the said infant children" and that the writ had been "issued improvidently and without probable cause" (R. 19-20). Thereafter, negotiations between the parties, both represented by counsel, resulted

in an agreement regarding custody of the children which was reduced to writing in the form of correspondence between counsel (R. 11-12, 74-75). Pursuant to this agreement and upon motion of counsel for both parties, the Law & Equity Court of the City of Richmond on November 18, 1959, entered an order which provided: "It being represented to the court by counsel that the parties hereto have agreed concerning the custody of the infant children, it is ordered that this case be dismissed" (R. 11-15, 20).

Under the agreement custody of the children was given to Respondent except that during summers and part of the Christmas holidays custody was given to Petitioner (R. 12-15). On August 10, 1960, when the children were with Petitioner in Greenville, South Carolina, under the provisions of the agreement, Petitioner, in disregard of her agreement, instituted this proceeding in the Juvenile & Domestic Relation Court of the County of Greenville, South Carolina. Process was served upon Respondent when he arrived in Greenville to inform his children of the death of their grandmother, Respondent's mother (R. 145-146). In his answer to Petitioner's complaint, Respondent alleged that he was entitled to custody and that Petitioner had "violated and breached the agreement made between the parties by and with their respective legal counsel and further violated the Order of the Court of record in Richmond, Virginia that was duly issued and based upon said agreement." Respondent further alleged that Petitioner "was guilty of gross misconduct during the time . . . [Petitioner and Respondent] resided as husband and wife and such gross misconduct included acts of adultery on numerous occasions during July and August, 1959 in Gloucester, Virginia, Chesterfield County, Virginia and a motel at Bowling Green, Virginia with a married man who resides in Richmond, Virginia" (R. 8-11). After a hearing in October, 1960, the Juvenile & Domestic

Relations Court of the County of Greenville entered an order on December 8, 1960, which awarded custody and control of the children to Petitioner subject only to reasonable rights of visitation by Respondent (R. 20-28).

Respondent appealed this order to the Court of Common Pleas for Greenville County, South Carolina. After a hearing on the record made in the court below on January 9, 1961, the Court of Common Pleas awarded custody to Petitioner and Respondent jointly, and the order of the court, entered on February 25, 1961, provided that Petitioner should have custody during the normal school year and that Respondent should have custody during the normal holiday months and during the normal Christmas holidays (R. 185-191).

An appeal by Respondent to the Supreme Court of South Carolina resulted in a reversal of the Court of Common Pleas and a reinstatement of the agreement upon which the Virginia order was based. In concluding its opinion, which was dated November 15, 1961, the Supreme Court of South Carolina, in referring to the "dismissed agreed" order of the Law & Equity Court of the City of Richmond, stated:

> "Such a judgment of dismissal entered by agreement of the parties, pursuant to a compromise or settlement of the controversy, is a judgment on the merits, barring another action for the same cause and is equivalent to a judgment of retraxit. If the respondent here had instituted in the Courts of Virginia the action commenced by her in the Courts of this State, the appellant could have successfully interposed a plea of *res judicata* as a defense to said action. Since the judgment entered in the Virginia Court by agreement or consent is *res judicata* in that State, it is *res judicata* and entitled to full faith and credit in this State. We are required under Art. IV, Sec. 1 of the Constitution of the United States to give the same faith and credit in this State to the 'dismissed agreed' order or judgment as 'by law or

usage' the Courts of Virginia would give to such order or judgment.

* * *

"... [A]fter examining the pleadings and the entire record we find neither allegation nor proof of any changed circumstances authorizing a change of the custody of the minor children of the parties to this action.

"Since we have reached the conclusion that the 'dismissed agreed' order of the Law and Equity Court of the City of Richmond, Virginia, is a bar to this action between the same parties for the same cause, *in the absence of any allegation or proof of any changed circumstances requiring a change of the custody of the children here involved*, the agreement reached by the parties prior to the order of the Virginia Court is still of full force and effect" (Pet. for Cert. A 11-12, 123 S.E. 2d at 39). (Emphasis added.)

On December 11, 1961, the Supreme Court of South Carolina denied a petition for rehearing filed by Petitioner, and on December 13, 1961, that court denied a motion for stay of remittitur also filed by Petitioner. On December 22, 1961, Mr. Justice Frankfurter issued an order staying the execution and enforcement of the judgment of the Supreme Court of South Carolina pending the filing of a petition for certiorari.

ARGUMENT

NO FEDERAL QUESTION OF SUBSTANCE IS INVOLVED IN THIS CASE WHICH WOULD JUSTIFY REVIEW BY THIS COURT

A.

The "Dismissed Agreed" Order of the Virginia Court Was Res Judicata and Was Not Subject to Modification in Virginia under the Circumstances

In her petition for certiorari, Petitioner does not contend that the "dismissed agreed" order of the Law & Equity Court of the City of Richmond, Virginia, was not res judicata in Virginia. Such a contention, of course, would involve a question to be determined by Virginia law, and the decision of the Supreme Court of South Carolina on this question is fully supported by the Virginia cases. See *Virginia Concrete Co. v. Board of Supervisors,* 197 Va. 821, 91 S.E. 2d 415 (1956); *Martin v. Martin,* 167 Va. 206, 188 S.E. 148 (1936); and *Bardach Iron & Steel Co. v. Tenenbaum,* 136 Va. 163, 118 S.E. 502 (1923).

Nor does Petitioner allege fraud or duress in the procurement of the Virginia order.

Nor does Petitioner contend in her petition for certiorari that a Virginia custody order will be modified by Virginia courts in the absence of materially changed conditions affecting the welfare of the children involved and arising after the entry of the prior custody order. The failure of Petitioner to make this contention is understandable because it is clear that the Virginia courts will not modify their custody decrees in the absence of such changed conditions. See *Campbell v. Campbell,* 203 Va. 61, 64, 122 S.E. 2d 658, 661 (1961) (dictum); *Semmes v. Semmes,* 201 Va. 117, 109 S.E. 2d 545

(1959); *Andrews v. Geyer*, 200 Va. 107, 104 S.E. 2d 747 (1958); and *Darnell v. Barker*, 179 Va. 86, 18 S.E. 2d 271 (1942). The factual similarity of *Semmes v. Semmes* and *Andrews v. Geyer* to the case before this Court on petition for certiorari is striking. In all three of these cases the wife was the guilty party; in all three cases the wife *agreed* to a grant of primary custody to the husband; in all three cases there was no evidence of misconduct on the part of the wife following the entry of the first custody decree; and, finally, in all three cases there was no evidence of a material change in conditions following the entry of the first decree. In the *Semmes* and *Andrews* cases the Supreme Court of Appeals of Virginia refused to modify the original decree granting custody of the children to the husband.

Nor does Petitioner contend that any material changes in conditions affecting the welfare of the children have occurred since the entry of the Virginia "dismissed agreed" order. The failure of Petitioner to make this contention is also understandable in view of the following statement by the Supreme Court of South Carolina:

> "[A]fter examining the pleadings and the entire record we find neither allegation nor proof of any changed circumstances authorizing a change of the custody of the minor children of the parties to this action" (Pet. for Cert. A 12, 123 S.E. 2d at 39).

Thus, Petitioner is seeking a review by this Court of a decision of the Supreme Court of South Carolina which held that a Virginia decree entered by agreement of the parties was entitled to full faith and credit, a Virginia decree which was res judicata in Virginia and which was not subject to modification in Virginia because no material change had occurred in conditions affecting the welfare of the children involved. Petitioner argues in her petition for certiorari that the decision of the Supreme Court of South Carolina results

in "manifest injustice" because custody was thereby awarded to Respondent (Pet. for Cert. 5-6). The use of such language is incomprehensible in view of the fact that the South Carolina decision merely required Petitioner to abide by her own agreement and the Virginia order based upon it, an agreement which Petitioner had violated within ten months after making it. Such language is equally incomprehensible in view of the fact that no court, either in Virginia or South Carolina, has ever indicated that Respondent was not a suitable custodian for his children. As the Court of Common Pleas for Greenville County, South Carolina, said:

> "I agree with the Judge of the Juvenile and Domestic Relations Court that the custody of these three minor children may well be left in the hands of either the plaintiff [Petitioner] or the defendant [Respondent]" (R. 187).

B.

The Decision of the Supreme Court of South Carolina Is in Accord with the Decisions of this Court.

Petitioner says in her petition for certiorari that "this decision of a federal question by the South Carolina Supreme Court is not in accord with the applicable decisions of this Court as expressed in *Kovacs v. Brewer*, 356 U.S. 604 (1958); [*New York ex rel.*] *Halvey v. Halvey*, 330 U.S. 610 (1947); and *May v. Anderson*, 345 U.S. 528 (1953)." (Pet. for Cert. 6). But Petitioner does not say in what respect the decision of the Supreme Court of South Carolina deviated from the decisions of this Court.

In *New York ex rel. Halvey v. Halvey*, *supra*, this Court permitted a New York court to modify the custody provisions of an *ex parte* Florida divorce decree where, in the

words of Mr. Justice Douglas, "It is not shown that the New York court in modifying the Florida decree exceeded the limits permitted under Florida law." 330 U.S. at 615. Here, conversely, the South Carolina court found, and Petitioner does not deny before this Court, that modification would not have been permitted in Virginia, for there was no evidence of changed circumstances since the Virginia decree. Therefore the South Carolina court refused modification. Mr. Justice Frankfurter said in *Halvey* that "the jurisdiction of the Florida court in making the custodial decree is doubtful." *Id.* at 618 (concurring opinion). Here no question of the jurisdiction of the Virginia court to enter its decree has ever been raised at any stage of this protracted litigation.

In *May v. Anderson, supra*, this Court held that a Wisconsin court was not required to give full faith and credit to the custody provisions of an *ex parte* Ohio divorce decree in the absence of personal jurisdiction over the wife. Here Petitioner, Respondent, and their children were personally before the Virginia court.

In *Kovacs v. Brewer, supra*, this Court remanded the case to the Supreme Court of North Carolina for clarification of the basis of it's denial of full faith and credit to a New York custody decree, stating that if it were denied in the absence of a finding of changed circumstances "difficult and important questions of constitutional law" would be raised. *Id.* at 607.

In the present case Petitioner says that the South Carolina court erred in giving full faith and credit to a Virginia "dismissed agreed" order concerning custody of minor children where no changed circumstances were alleged or proved. She says that full faith and credit should not have been given because the Virginia order was based on an agreement between the parties not disclosed to the Virginia court, but

she does not allege the violation of any constitutional right. This case does not involve what might be the more important question whether custody decrees of any sort are entitled to full faith and credit outside the state of their issuance in the absence of changed circumstances. Petitioner therefore seeks a writ of certiorari on a question of very narrow scope, primarily pertinent only to her peculiar situation. Normally this Court has not granted certiorari in such cases. See, *e.g.*, *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955); Sup. Ct. R. 19-1(a); Harlan, *Manning the Dikes—Some Comments on the Statutory Certiorari Jurisdiction and Jurisdictional Statement Practice of the Supreme Court of the United States*, 13 Record of N.Y.C.B.A. 541 (1958).

The decision of the Supreme Court of South Carolina does not present a federal question of substance, and it is probably in accord with the decisions of this Court. The result prevents disgruntled parents from continuing litigation which might otherwise be pursued successively in the courts of as many as fifty jurisdictions—litigation which bears heavily on the psychological development of the children involved. The result achieves a termination of "unseemly litigious competition between the states and their respective courts as well as between parents". *New York ex rel. Halvey v. Halvey*, 330 U.S. at 620 (Mr. Justice Rutledge, concurring). And the same result would be achieved on grounds of comity and of local law. See *May v. Anderson*, 345 U.S. at 535-36 (Mr. Justice Frankfurter, concurring).

CONCLUSION

Because the Virginia custody decree was res judicata and not subject to modification in that state in the absence of changed circumstances, the Supreme Court of South Carolina properly held under the applicable decisions of this

Court that such Virginia decree was entitled to full faith and credit. Therefore, no federal question of substance is involved in this case in which review is sought by petition of certiorari and Respondent respectfully prays that such petition be denied.

JOHN S. DAVENPORT, III
ANGUS H. MACAULAY, JR.
DENNY, VALENTINE & DAVENPORT
1300 Travelers Building
Richmond 19, Virginia

WESLEY M. WALKER
LEATHERWOOD, WALKER, TODD & MANN
P. O. Box 1589
Greenville, South Carolina

Attorneys for Respondent

LIBRARY

Office Supreme Court, U.S.
FILED
AUG 24 1962
JOHN F. DAVIS, CLERK

Supreme Court of The United States

OCTOBER TERM, 1962

No. 63

BARBARA D. FORD,

Petitioner

v.

HERMAN A. FORD,

Respondent

BRIEF OF PETITIONER

W. FRANCIS MARION
O. G. CALHOUN
409 E. North Street
Greenville, South Carolina

REX L. CARTER
Lawyers Building
Greenville, South Carolina
Counsel for Petitioner

CHRISTIAN, BARTON, PARKER, EPPS & BRENT
Richmond, Virginia

HAYNSWORTH, PERRY, BRYANT,
MARION & JOHNSTONE
Greenville, South Carolina

Of Counsel

INDEX

Opinion of the Court Below 1

Grounds of Jurisdiction 1

Constitutional Provision Involved 2

Statute Involved 2

Question Involved 3

Statement 3

Summary of Argument 7

- Question I 8
- Question II 11
- Question III 16

Conclusion 18

Appendix

- Opinion 21

TABLE OF CITATIONS

Federal Statutes

U. S. Const. Art. IV § 1 2,17,18

28 U. S. C. § 1738 (1948) 2,11

28 U. S. C. § 1257 (3) (1948) 2

State Statutes

S. C. Code § 10–231 (1952) 10

S. C. Code § 10–1005 (1952) 11

S. C. 48 Stat. 1825 (1954) Sec. 7 5,16

Cases

Adam v. Saenger, 303 U. S. 59 (1938) 12

Aetna Casualty Co. v. Board of Supervisors, 160 Va. 11, 168 S.E. 617 (1933) 12

Bardach Iron and Steel Co. v. Tenenbaum 136 Va. 163, 118 S.E. 502 (1923) 12,15

Boone v. Boone, 132 F. 2d 14 (D. C. Cir. 1942) 9

Boone v. Boone, 150 F. 2d 153 (D. C. Cir. 1945) 7,8,9,10,16

Brooks v. Brooks, 200 Va. 530, 106 S.E. 2d 611 (1959) 16

Buchanan v. Buchanan, 170 Va. 458, 197 S.E. 426 (1938) 16

Ex Parte White, 49 Cal. App. 2d 160, 121 P. 2d 100 (1942) Aff'd 54 Cal. App. 2d 637, 129 P. 2d 706 (1942) 10

Finlay v. Finlay, 240 N. Y. 429, 148 N.E. 624 (1925) 17

Florance v. Florance, 197 Va. 432, 90 S.E. 2d 111 (1959) 16

Gloth v. Gloth, 154 Va. 511, 153 S.E. 879 (1930) 16

Hinton v. Norfolk and Western Ry. Co., 137 Va. 605, 120 S.E. 135 (1923) 12,13,14,15

Hoover v. Mitchell, 66 Va. (Gratt.) 387 (1874) 12,13,14

Kovacs v. Brewer, 356 U. S. 604 (1958) 17

Martin v. Martin, 167 Va. 206, 188 S.E. 148 (1936) 12,13,14,15

May v. Anderson, 345 U. S. 528 (1953) 8,17

Mullen v. Mullen, 188 Va. 259, 49 S.E. 2d 349 (1948) 16

Murden v. Wilbert, 189 Va. 358, 53 S.E. 2d 42 (1949) 12,14,15

Payne v. Buena Vista Extract Co., 124 Va. 296, 98 S.E. 34 (1919) 12,13,15

People of State of New York v. Halvey, 330 U. S. 610 (1947) 7,8,9,17

Queen v. Gyngall, 2 Q.B. Div. 232 (1893) 17

Stron v. Ruleman's Ex'or, 73 Va. (32 Gratt.) 215 (1879) 12

Tate v. The Bank of the State of New York, 96 Va. 765, 32 S.E. 476 (1899) 12

Virginia Concrete Co. v. Board of Supervisors, 197 Va. 821, 91 S.E. 2d 415 (1956) 12

Wilcher v. Robertson, 78 Va. 602 (1884) 12,13

Williams et al v. State of North Carolina, 325 U. S. 226 (1947) 17,18

Williams v. Woolfolk, 188 Va. 312, 49 S.E. 2d 270 (1948) . . 16

Wohlford v. Compton, 79 Va. 333 (1884) 12,13,14

Supreme Court The United States

OCTOBER TERM, 1962

No. 63

BARBARA D. FORD, *Petitioner*,

v.

HERMAN A. FORD, *Respondent*.

BRIEF OF PETITIONER

OPINION OF THE COURT BELOW

The opinion of the South Carolina Supreme Court printed in appendix A, hereto, is reported in 239 S.C. 305, 123 S.E. 2d 33.

GROUNDS OF JURISDICTION

In his answer to the petitioner's action for custody filed in the Juvenile and Domestic Relations Court for Greenville County, South Carolina, the respondent claimed a right under U. S. Const. Art. IV, § 1, alleging that a prior order of the Law and Equity Court of the City of Richmond, Virginia was entitled to full faith and credit whereby the matter was res judicata. The claimed right was denied by the Juvenile and Domestic Relations Court and by the Court of Common Pleas for Greenville County to which he appealed, but the South

Carolina Supreme Court to which he thereafter appealed sustained the right.

On January 15, 1962 a petition for writ of certiorari to the Supreme Court of South Carolina was filed under 28 USC. Sec. 1257 (3), and certiorari was granted by order of this Court, filed February 26, 1962.

CONSTITUTIONAL PROVISION INVOLVED

Article IV.-States-Reciprocal Relationship Between States and With United States

Section I. Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.

STATUTE INVOLVED

Title 28 § 1738. *State and Territorial Statutes and Judicial Proceedings; Full Faith and Credit.*

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The Records and judicial proceedings of any court of any State, Territory, or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken. June 25, 1948, c. 646, 62 Stat. 947.

QUESTION INVOLVED

Does an order of dismissal of a habeas corpus proceeding in the Law and Equity Court of the City of Richmond, Virginia, which was voluntarily obtained after the parties privately agreed concerning the custody of their infant children, preclude the courts of the State of South Carolina from awarding custody based upon the best interest of the children?

STATEMENT

The petitioner, Barbara Ford, and the respondent, Herman Ford, are the mother and father of three children, now five, seven, and nine years of age. Custody of the children was the subject of a habeas corpus proceeding instituted by Herman Ford in the Law and Equity Court of the City of Richmond, Virginia in August, 1959, which was dismissed on November 18, 1959, and was the subject of an action filed by Barbara Ford in the Juvenile and Domestic Relations Court of Greenville County, South Carolina in August, 1960. Herman Ford appealed from the decree of the latter court to the Court of Common Pleas for Greenville County, wherein the decree of the trial court was affirmed with minor modifications, and thence to the South Carolina Supreme Court, wherein the decrees of the lower courts were set aside on the ground that the Virginia dismissal was res judicata and entitled to full faith and credit. The matter is thus before this Court on writ of certiorari.

A brief reference to the factual background is necessary to an understanding of the circumstances by which the habeas corpus proceeding was instituted in Virginia when the parties were residents of North Carolina. Barbara and Herman Ford married in 1952, and after living in numerous places in Southeastern United States and in Germany, they moved, in January 1958, to Sanford, North Carolina and established a permanent residence (R. 138). In August, 1959 marital difficulty developed between them and they decided to make an overnight trip to Richmond, Virginia to discuss the problem with a psychiatrist (R. 72, 150), leaving the children in Sanford, with

their maid. When they arrived in Richmond, however, Herman Ford stated, according to Barbara, that he intended to obtain a divorce and take the children (R. 72), or, by his testimony, that he would try to get custody of the children (R. 150). He left Barbara Ford in Richmond at her mother's home, and the next day she returned to Sanford and found that the maid and the children were gone and their house was closed (R. 73). After calling hotels and motels in the vicinity and in Greensboro and Raleigh, North Carolina she finally discovered that Herman Ford had called the maid from Richmond and arranged to have her driven with the children to a motel in Fayetteville, North Carolina (R. 73, 74, 155, 156). Barbara Ford took the children from the motel and returned with them to her mother's home in Richmond, whereupon Herman Ford filed the habeas corpus proceeding in the Law and Equity Court of the City of Richmond seeking their custody.

Barbara Ford, by her attorney, filed her return and a motion to quash the writ (R. 19, 20), but thereafter, by means of correspondence between their attorneys which was not revealed to the court (R. 25), an arrangement for the care of the children and dismissal of the habeas corpus proceeding was agreed upon (R. 12, 15); and on November 18, 1959 an order of dismissal was filed, which recited in its entirety (R. 20):

> "It being represented to the court by counsel that the parties hereto have agreed concerning the custody of the infant children, it is ordered that this case be dismissed."

On January 10, 1960 Barbara Ford moved to Greenville, South Carolina. About ten days later the youngest child, Jay, was brought to live with her (R. 76, 143), and on June 20, 1960 the other two children were brought to live with her during the summer (R. 144). When she had become situated to care for the children, having attended business school and obtained employment (R. 75), and instituted the action in the Juvenile and Domestic Relations Court for Greenville County, all three children were thus living with her. The action was instituted

on August 10, 1960 and personal service was had upon Herman Ford when he came to Greenville on that date (R. 145).

Herman Ford's answer was in the form of a general denial and it also plead in bar to the action as res judicata the correspondence effecting the private agreement and the order of dismissal of the habeas corpus proceeding in the Law and Equity Court of the City of Richmond (R. 8-11).

After lengthy hearings at which eleven witnesses testified, the Judge of the Juvenile and Domestic Relations Court, who has exclusive jurisdiction over such matters,[1] held that the agreement was not a part of the decree of the Law and Equity Court of the City of Richmond and that the order of that court was not res judicata but was a mere order of dismissal without prejudice (R. 25). As to the merits, he found that it would be to the best interest of the children to be in the custody and control of their mother and decreed accordingly (R. 28), but suggested "that the parties work out a provision for the defendant to have the children during a portion of their summer vacation and on holiday seasons, as well as certain other visitations." (R. 27).

On appeal to the Court of Common Pleas the record consisted of the transcribed typewritten record of the evidence in the Juvenile and Domestic Relations Court, the appellant's narrative statement of the proceedings, and his exceptions and assignments of error thereto (R. 187), including, among others, the failure to hold that the order of dismissal of the Law and Equity Court of the City of Richmond was binding and res judicata (R. 37). In his order, by which the decree of the trial judge was modified only to the extent that the respondent would have custody of the children during specified holiday periods rather than visitation rights during such periods to be agreed upon by the parties, the Judge of the Court of

1. S. C. 48 Stat. 1827 (1954), Sec. 7. When court to have original jurisdiction. — (a) Except as otherwise provided herein the court shall have exclusive original jurisdiction and shall be the sole agency for initiating action concerning any child living or found within the county: *** (5) whose custody is the subject of controversy except in those cases where the law now gives other courts exclusive jurisdiction; ***

Common Pleas said with regard to the Virginia proceeding (R. 188, 189):

> "Much has been said in this case about the agreement that was reached between the plaintiff and the defendant, as a result of the settlement of the Habeas Corpus custody proceeding before the Law and Equity Court of the City of Richmond, Virginia, being res adjudicata and controlling in this proceeding. To hold that the custody of these three children was fully and finally determined in Richmond, Virginia, by the agreement reached between the plaintiff's attorneys and the defendant's attorneys would be unfair to the children and too harsh a rule to follow. The children were not parties to the suit in Richmond, Virginia. The children were before that Court only in the capacity of bodies that were being contended over. The children were merely the res that was being pulled back and forth between the mother and father. These children are the especial charges of this Court of Equity and their interest is paramount and even if it is necessary to disregard established principles of law in order to protect their interest that will be done by a Court of Equity when it appears that the best interest of the children is jeopardized."

Herman Ford then appealed to the South Carolina Supreme Court on similar assignment of error (R. 191). By the majority opinion of the South Carolina Supreme Court filed November 15, 1961, it was held that the order of the Law and Equity Court of the City of Richmond, Virginia was an order "dismissed agreed", constituting a judgment on the merits barring another action for the same cause in Virginia; and that under Article IV, Section 1 of the Constitution of the United States the South Carolina Court was required to give full faith and credit (R. 205). Mr. Justice Oxner dissented, however, stating that in this proceeding the respondent, Barbara Ford, is not seeking to relitigate an issue which had been litigated in Virginia (R. 207), and that the order entered by the Virginia Court was not pronounced in the exercise of its judicial function (R. 208).

Within due time a petition for rehearing was filed in the

South Carolina Supreme Court, which was refused, Mr. Justice Oxner again dissenting. Thereafter on January 15, 1962 the petitioner, having obtained a stay of remittitur from this Court, filed a petition for writ of certiorari to the Supreme Court of South Carolina, which was granted on February 26, 1962.

SUMMARY OF ARGUMENT

The petitioner readily concedes that the South Carolina Court may, if it sees fit, recognize as a matter of local law the order of dismissal of the Law and Equity Court of the City of Richmond. Similarly, it could, although not consistent with its responsibility, award custody in accordance with the parent's private agreement which had been determined not to the best interest of the children. The petitioner urges, however, that the South Carolina Court erred in concluding and holding that the order of dismissal of the Virginia Court was res judicata and, in any event, that the South Carolina Courts were inexorably bound under Article IV; Section I of the Constitution of the United States to give full faith and credit thereto for the reasons that:

(a) There was no judicial determination on the merits by the Virginia Court. In actions involving custody of infants a court may inquire into "what was litigated and what was adjudicated"[2] in a previous action; and "when an earlier award was made casually, upon a consent basis, or without full inquiry ••• the decision is entitled to little weight in another court, which, later faces squarely the question of the child's present welfare."[3]

(b) As is implicit by the language of the *Act of May 26, 1790, c. 11*, as amended, 28 U. S. C. § 1738 (1948), and as was held in *People of State of New York v. Halvey*, 330 U. S. 610 (1947) a judgment or order has no more conclusive or final ef-

2. People of State of New York v. Halvey, 330 U. S. 610, 616 (1947).
3. Boone v. Boone, 150 F. 2d 153, 156 (D. C. Cir. 1945).

fect in the State of the Forum than it has in the State where rendered. The order of the Virginia Court was not, by law or usage in the courts of that State, res judicata, thus it is not res judicata in the South Carolina Court. And,

(c) The South Carolina Court, when its jurisdiction is invoked in its capacity as *parens patriae*, is unrestricted in its power and duty to determine what is in the best interest of the children before it and to award custody accordingly, *May v. Anderson*, 345 U. S. 528 (1953) (concurring opinion by implication); *Boone v. Boone*, 150 F 2d 153 (D. C. Cir. 1945).

I

The Order Of The Virginia Court Was Not The Product Of An Adjudication On The Merits Therefore It is Not Entitled To Full Faith And Credit.

Recapitulating the uncontroverted facts and circumstances of this litigation as set forth in the record: The habeas corpus proceeding was instituted in the Virginia Court at a time when neither of the parties nor their children were residents or domiciliaries of Virginia (R. 16). The children were not physically brought before the court (R. 19), and the parents, by their attorneys, merely filed pleadings therein. There was no hearing on the merits (R. 20); and the agreement of the parents, which was reached privately and which was not even formalized into a writing carrying their signature (R. 12-15), was not revealed to the court (R. 25).

The order of the Law and Equity Court contained no findings of fact, no conclusions of law, no incorporation by reference of any written instrument or letter, and did not recite that it was a dismissal with prejudice (R. 20, 25).

On the other hand, the proceeding in South Carolina was instituted when the petitioner and all three children were, and had been for several months, domiciled in Greenville County, South Carolina (R. 76, 143, 144), and personal service was had upon the respondent therein (R. 145). Formal hearings at

which eleven witnesses testified and full arguments, both as to the best interests of the children and the effect of the Virginia proceeding, were heard before the Judge of the Juvenile and Domestic Relations Court who specializes in such matters. Based upon the evidence and having had the opportunity to see the witnesses on the stand and hear their testimony, the Juvenile and Domestic Relations Judge concluded, in effect, that the private agreement of the parties did not provide for the children's best welfare (R. 26, 27); and in his very comprehensive order custody was awarded solely upon the basis of that which was in the children's best interest.

In accordance with the South Carolina procedure, the matter was appealed to the Court of Common Pleas for Greenville County, and the Judge of that Court, having the entire transcript of the testimony before him (R. 187), and having heard oral arguments and considered the written briefs of counsel, affirmed the trial judge in all material respects.

As against this background, we are here squarely faced with the question of whether the Constitution of the United States requires that the former proceeding take priority over, or preclude, the latter, whereby the children's welfare should be subverted to the private agreement of their parents, regardless of whether same is deemed formal or informal, and regardless of the intent of the parties as to its permanency and of the circumstances under which it was made.

As indicated by the concurring opinion of Mr. Justice Frankfurter in *People of the State of New York v. Halvey*, *supra*, inquiry by the South Carolina Court as to what was litigated and what was adjudicated in the Virginia Court was not foreclosed; and surely, as shown by the foregoing recapitulation, the Virginia proceeding could not be deemed a true adjudication on the merits. The weight and effect to be given such an order was in issue in *Boone v. Boone*, *supra*, wherein the court, in referring to the test of changed circumstances, quoted Judge Edgerton in the earlier Boone case[4] as follows: "This is simply to say that we should not needlessly thresh

4. Boone v. Boone, 132 F. 2d 14, 16 (D.C. Cir. 1942).

over old straw but should apply the doctrine of res judicata as far as the nature of the case permits." The court agreed that when the court of one state has exercised control over a child and the child comes under the control of another jurisdiction, the courts of the latter should respect the earlier judgment, to the extent that issues there presented were then judicially determined; but it went on to succinctly state, at page 156 of the Report:

> "When an earlier award has been made, casually, upon a consent basis, or without full inquiry—or when the decision, and the record back of it, reveals that it is based upon considerations of illegality of detention, res judicata and other such formulae—that decision is entitled to little weight in another court which, later, faces squarely the question of the child's present welfare."

The persuasive logic employed in *Boone v. Boone, supra,* was also employed in Ex parte *White,* 49 Cal. App. 2d 160, 161, 121 P. 2d 100, 101 (1942), *aff'd* 54 Cal. App. 2d 637, 129 P. 2d 706 (1942), wherein the court said:

> "• • • Furthermore, the petition recites that at the former hearing no evidence was introduced relating to the fitness of any of the parties to have the custody of the minor, or of environment. The court made no findings, but merely denied the writ. The question decided by the Superior Court was therefore one of law alone. Petitioner is therefore entitled to a full hearing in this court upon the issues, set forth in her petition."

In South Carolina, as in most if not all states, when an action is by or against an infant he must appear by guardian ad litem,[5] and before such guardian ad litem may settle the action he must present to the court with a copy of the pleadings a verified petition stating the reasons why, in his opinion, the settlement should be made. The court must then consider the matter and can authorize the guardian ad litem to consummate the settlement only when, in its discretion, the settlement is

5. S. C. Code § 10-231 (1952).

proper and to the best interest of the minor.[6] It would, indeed, be a curious anomaly if our court did not guarantee equal or greater protection to a minor when his very life and well being are involved, than it grants when a minor's mere property rights are involved; and we earnestly contend that the Framers of the Constitution of the United States could not have intended that Article IV, Section I be interpreted to enforce such a result.

II

Regardless Of Whether The Order Of The Virginia Court Was An Order Of Dismissal Or An Order "Dismissed Agreed It Is Not Res Judicata To An Action For Custody Based Upon The Best Interests Of The Children.

The order of the Law and Equity Court of Richmond provided:

> "It being represented to the court by counsel that the parties hereto have agreed concerning the custody of the infant children, it is ordered that this case be dismissed."

By the *Act of May* 26, 1790, c.11, as amended, 28 U. S. C. § 1738 (1948), records and judicial proceedings shall have the same full faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken. The question, therefore, arises: If custody decrees in general, and the order of the Law and Equity Court of Richmond involved herein in particular, are of such nature as to be entitled to full faith and credit, what was the effect of the order of the Law and Equity Court by law or usage in the courts of Virginia, or, specifically, would it be res judicata in that state?

The Supreme Court of South Carolina decided that the order was an order "dismissed agreed" under Virginia decisions, and as such could have been successfully interposed under a

6. S. C. Code § 10-1005 (1952).

plea of res judicata in Virginia. This decision is, we submit, erroneous and cannot be accepted by this Court as final.[7]

The effect of an order "dismissed agreed" was first considered by the Supreme Court of Appeals of Virginia in *Hoover v. Mitchell*, 66 Va. (Gratt.) 387 (1874).[8] In that case a suit was brought to recover an amount paid by the plaintiff as endorser of a note, which suit was dismissed by the following order:

> "This day came again the parties by their attorneys, and this suit having been agreed, on motion it is ordered that this suit be dismissed agreed."

Subsequently, the plaintiff brought a second suit on the same cause of action against the same defendants, to which the defendants tendered a plea of former judgment. Being of the opinion that the order was tantamount to a retraxit, that is, an open and voluntary renunciation of the suit in court, the Supreme Court of Appeals of Virginia reversed the trial court's action in rejecting the plea and entered its judgment that

---

7. "While this Court re-examines such an issue with deference after its determination by a state court, it cannot, if the laws and Constitution of the United States are to be observed, accept as final the decision of the state tribunal as to matters alleged to give rise to the asserted federal right. This is specially the case where the decision is rested, not on local law or matters of fact of the usual type, which are peculiarly within the cognizance of the local courts, but upon the law of another state, as readily determined here as in a state court." Adam v. Saenger, 303 U. S. 59, 64 (1938).

8. While a number of decisions of the Supreme Court of Appeals of Virginia have discussed "dismissed agreed" orders, in only four discovered cases has such an order been held to be a bar to a succeeding action. Martin v. Martin, 167 Va. 206, 188 S.E. 148 (1936); Hinton v. Norfolk and Western Ry. Co., 137 Va. 605, 120 S.E. 135 (1923); Wohlford v. Compton, 79 Va. 333 (1884); Hoover v. Mitchell, 66 Va. (25 Gratt.) 387 (1874). Other cases involving or mentioning such orders are: Virginia Concrete Co. v Board of Supervisors, 197 Va. 821, 91 S.E. 2d 415 (1956); Murden v. Wilbert, 189 Va. 358, 53 S.E. 2d 42 (1949); Aetna Casualty Co. v. Board of Supervisors, 160 Va. 11, 168 S.E. 617 (1933); Bardach Iron and Steel Co. v. Tenenbaum, 136 Va. 163, 118 S.E. 502 (1923); Payne v. Buena Vista Extract Co., 124 Va. 296, 98 S.E. 34 (1919); Tate v. The Bank of the State of New York, 96 Va. 765, 32 S.E. 476 (1899); Wilcher v. Robertson, 78 Va. 602 (1884); Siron v. Ruleman's Ex'or, 73 Va. (32 Gratt.) 215 (1879).

"the dismission of a suit agreed, without any explanation or qualification showing a contrary intention, is at least a prima facie determination of the matters controverted in that suit, and may be pleaded in bar of a subsequent suit in the same cause of action between the same parties; . . ."[9]

Subsequent opinions of the Virginia court, however, leave no doubt that an order "dismissed agreed" must be distinguished from an order of dismissal.[10] The latter, in Virginia, is not a bar to a second action, even though entered by consent of the parties.[11]

The precise issue of whether or not an order in the language of, and entered under the circumstances of, the order involved in this case constitutes an order "dismissed agreed" has not been decided by the Virginia court; nor has the precise issue of whether or not, in any event, such an order would be given effect as res judicata in a custody proceeding been decided by that court.

Subsequent to its initial decision in *Hoover v. Mitchell, supra,* the Virginia court held that an order "dismissed agreed" barred second actions to secure contribution on the purchase price of real property from an alleged joint purchaser,[12] to recover damages for personal injury in a negligence action,[13] and to determine the validity of a deed of trust on a piece of real estate.[14] In none of these cases was any consideration of public policy, such as is inherent in the question of custody of infants, even remotely involved. Nor were the orders involved in these cases the same as the one before the Court in this case.

Initially, it is not clear that the order of the Law and Equity Court of the City of Richmond is in fact a "dismissed

---

9. Hoover v. Mitchell, *supra* at 391.
10. See Payne v. Buena Vista Extract Co., 124 Va. 296, 313, 98 S.E. 34, 40 (1919).
11. Wilcher v. Robertson, 78 Va. 602, 618 (1884).
12. Wohlford v. Compton, 79 Va. 333 (1884).
13. Hinton v. Norfolk and Western Ry. Co., 137 Va. 605, 120 S.E. 135 (1923).
14. Martin v. Martin, 167 Va. 206, 188 S.E. 148 (1936).

agreed" order, rather than simply an order of dismissal. Two features of the order should be noted: first, by its terms it merely orders that the "case be dismissed", omitting the word "agreed"; second, it appears from the order that the terms of the agreement were never revealed to the court.

Analysis of the Virginia decision reveals that in those cases in which the order did not expressly state that the case was "dismissed agreed," the terms of the agreement were revealed to the court before its order was given res judicata effect.[15] Thus in *Hinton v. Norfolk and Western Ry. Co.*, 137 Va. 605, 120 S.E. 135 (1923), an infant brought suit by his next friend claiming damages in the amount of $125.00 for personal injuries allegedly due to the defendant's negligence. This action was dismissed by the following order:

> "On motion of the plaintiff by R. S. Parks, his counsel, and it appearing to the court that this action has been compromised between the parties on the terms that the defendant should pay the sum of $125.00 and further that the said sum has been paid to the duly qualified guardian of the plaintiff, who consented to compromise and who is also the mother of the plaintiff and his next friend in this action, it is ordered that this cause be *dismissed settled.*"[16]

In the subsequent suit by the infant on the same cause of action this order was given the effect of an order "dismissed agreed".[17] Likewise, in *Martin v. Martin*, 167 Va. 206, 188 S.E. 148 (1936), the order entered in the first suit which was held to bar the second suit was entered only after a written agree-

---

15. *Compare* Martin v. Martin, 167 Va. 206, 188 S.E. 148 (1936) and Hinton v. Norfolk and Western Ry. Co., 137 Va. 605, 120 S. E. 135 (1923); *with* Murden v. Wilbert, 189 Va. 358, 53 S.E. 2d 42 (1949), Wohlford v. Compton, 79 Va. 333 (1884) and Hoover v. Mitchell, 66 Va. (25 Gratt.) 387 (1874).

16. Hinton v. Norfolk and Western Ry Co., *supra* at 607, 120 S.E. at 135 (Emphasis added).

17. It was argued by the plaintiff that the order did not approve the terms of the agreements, but since the stated settlement of the prior case was the entire amount of damages claimed it was held that approval was not necessary. *Id.* at 610, 120 S.E. at 136.

ment of the parties had been submitted to the court, and which, indeed, the court had been unwilling to accept until receiving a commissioner's report.[18]

Assuming, however, though not conceding, that the order of the Law and Equity Court of the City of Richmond was a "dismissed agreed" order, from a close reading of the Virginia decisions it is clear that such an order in a custody proceeding would not be res judicata in a Virginia court to a subsequent custody proceeding. Such an order is "evidence only 'that the cause of action has been adjusted by the parties themselves in their own way.' "[19] It does not go to the merits of the case, but is given that effect "because such an order imports that the dismissal is on the merits by stipulation of the parties."[20] Thus the real basis for giving barring effect to such an order in Virginia is the underlying contract of the parties.

This is forcefully brought out in *Bardach Iron and Steel Co. v. Tenenbaum,* 136 Va. 163, 118 S.E. 502 (1923), in which the Supreme Court of Appeals of Virginia considered the point of whether or not a trial court properly could set aside an order "dismissed agreed" once having entered it. On this point the court said:

> "The court has no power to make such a record except by consent of the parties, and, having obtained such consent and made the entry, it is equally without power to set it aside without the consent of both parties, *except upon some ground that would warrant the setting aside of other contracts of like nature.*"[21]

In other words, the question resolves itself to whether or not the court must honor the civil contracts of the parties.

There can be no doubt that a Virginia court is not so bound in a custody matter. In Virginia the rule is firmly established "that the welfare of the infant is the primary, paramount, and

---

18. Martin v. Martin, *supra.*

19. Murden v. Wilbert, 189 Va. 358, 363, 53 S.E. 2d 42, 44 (1949).

20. Payne v. Buena Vista Extract Co., 124 Va. 296, 313, 90 S.E. 34, 40 (1919). This principle lends further weight to Point I of this argument.

21. Bardach Iron and Steel Co. v. Tenenbaum, *supra,* at 171, 118 S.E. at 504. (Emphasis added.)

controlling consideration of the court in all controversies between parents over the custody of their minor children. All other matters are subordinate."[22] The rights of neither parent take precedence over the rights of the child.[23] The contract of the parents cannot bind a Virginia court on the question of custody of minor children in either divorce proceedings or habeas corpus proceedings.[24] "The custody and welfare of children are not the subject of barter."[25]

These principles have been enunciated time and again by the Virginia court, and constitute basic and strong public policy of that State. To conclude, as the Supreme Court of South Carolina did, that a Virginia court would favorably entertain a plea of res judicata based on an agreement between parents, in a matter where the primary interest is the welfare of the children, is absolutely contrary to this public policy, and therefore is plainly wrong.

III

In Its Parens Patriae Jurisdiction, Properly Invoked, A State May Resolve Questions Of Custody Solely Upon The Basis Of That Which Is In The Best Interest Of The Children.

This matter was heard in the Juvenile and Domestic Relations Court of Greenville County. The jurisdiction of the court is defined in S. C. 48 Stat. 1827 (1954), see note 1, *supra*, which provides that the Juvenile and Domestic Relations Court shall have exclusive jurisdiction and shall be the sole agency for initiating action concerning any child living or found within

22. Brooks v. Brooks, 200 Va. 530, 539, 106 S.E. 2d 611, 617 (1959); Florance v. Florance, 197 Va. 432, 435, 90 S.E. 2d 111, 113 (1959); Mullen v. Mullen, 188 Va. 259, 269, 49 S.E. 2d 349, 354 (1948).

23. Mullen v. Mullen, *supra*, at 270, 49 S.E. 2d at 354.

24. Williams v. Woolfolk, 188 Va. 312, 317, 49 S.E. 2d 270, 272 (1948); Gloth v. Gloth, 154 Va. 511, 551, 153 S.E. 879, 892, 71 A.L.R. 700, 720 (1930); Buchanan v. Buchanan, 170 Va. 458, 477, 197 S.E. 426, 434, 116 A.L.R. 688, 698 (1938).

25. Buchanan v. Buchanan, *supra* at 477, 197 S.E. at 434, 116 A.L.R. at 698 (1938). Compare the controlling principles in Virginia with those discussed in Boone v. Boone, 150 F. 2d 153 (D.C. Cir. 1945).

the county whose custody is the subject of controversy. Although the proceeding is designated "*Barbara D. Ford, plaintiff v. Herman A. Ford, defendant*", no divorce or separation was sought; and as expressed by Mr. Justice Cardozo,[26] the Judge of the Juvenile and Domestic Relations Court acted as *parens patriae*. He was not adjudicating a controversy between adversary parties, to compose their private differences, and was not determining rights as between a parent and a child or as between one parent and another.[27]

In *People of the State of New York v. Halvey*, 330 U. S. 610, 616 (1947) this Court left undecided "whether the State which has jurisdiction over the child may, regardless of a custody decree rendered by another State, make such orders concerning custody as the welfare of the child from time to time requires"; and, although the issue has subsequently arisen in this Court,[28] the cases have been decided upon the grounds.

As indicated by the argument in Points I and II of this brief, it is believed that this is another case in which the consideration of the much broader issue of Point III need not necessarily be reached; but if this Court should decide otherwise, we earnestly contend that under the circumstances of this case wherein the application of the harsh rule of res judicata would serve to defeat that which has been judicially determined to be in the best interest of the children, the *parens patriae* jurisdiction of the Juvenile and Domestic Relations Court should be interposed. As discussed in Point I of this brief, states surely have equal if not greater responsibility to protect infants in their well being than to protect them in their property; and as the state has the responsibility, a fortiori it has the power insofar as it is within the confines of the Constitution. We believe that the Full Faith and Credit Clause does not preclude the free exercise of, or interposition of the *parens patriae* jurisdiction of a state for the reasons set forth in *Williams et al v. State of North Carolina*, 325 U. S. 226 (1945). Indeed, by merely substituting the

26. Finlay v. Finlay, 240 N. Y. 429, 148 N.E. 624, 626 (1925).
27. Queen v. Gyngall, 2 Q. B. Div. 232, 238 (1893).
28. May v. Anderson, 345 U. S. 528 (1953); Kovacs v. Brewer, 356 U. S. 604 (1958).

status or subject involved in the present case for that involved in the Williams case a consistent and, we submit, well warranted decision would result.[29] The children involved herein were domiciled in South Carolina when the proceeding was instituted in the Juvenile and Domestic Relations Court; and the State of South Carolina has delegated to that court the duty and power to act in *parens patriae*. The fact that the person who invoked the jurisdiction of the court happened to be the mother of the children, and the fact that the mother and the father had previously been parties to a proceeding in which the father had sought an adjudication as to custody but had subsequently consented to a dismissal upon agreement of the parties, are merely fortuitous circumstances and are of no effect. The State of South Carolina and the children themselves are the real parties in interest in the South Carolina proceeding, and there was no adjudication of their interests in the Virginia Court. The order of that court was, therefore, not res judicata.

CONCLUSION

For each and every of the foregoing reasons we submit that the South Carolina Court was not required by Article IV, Section I of the Constitution of the United States to grant full faith and credit to the order of the Law and Equity Court of the City of Richmond, Virginia, and that the order of that court

---

29. Williams et al v. State of North Carolina, 325 U. S. 226, 230 (1945): "Divorce, like marriage (Custody of infants), is of concern not merely to the immediate parties. It affects personal rights of the deepest significance. It also touches basic interests of society. Since divorce, like marriage (an award of custody), creates a new status, every consideration of policy makes it desirable that the effect should be the same wherever the question arises.

"It is one thing to reopen an issue that has been settled after appropriate opportunity to present their contentions has been afforded to all who had an interest in its adjudication. This applies also to jurisdictional questions. After a contest these cannot be relitigated as between the parties. (Citations omitted.) But those not parties to a litigation ought not to be foreclosed by the interested actions of others; especially not a State, which is concerned with a vindication of its own social policy and has no means, certainly no effective means, to protect that interest against the selfish action of those outside its borders."***. (Interpolation added).

was not res judicata; therefore, the judgment of the Supreme Court of South Carolina should be reversed.

Respectfully submitted

W. Francis Marion
O. G. Calhoun
409 E. North St.
Greenville, S. C.

Rex L. Carter
Lawyers Building
Greenville, S. C.
Counsel for Petitioner

Christian, Barton, Parker, Epps & Brent
Richmond, Va.
Haynsworth, Perry, Bryant, Marion & Johnstone
Greenville, S. C.
Of Counsel

APPENDIX

IN THE SUPREME COURT
OF THE STATE OF SOUTH CAROLINA

BARBARA D. FORD, *Respondent*,

v.

HERMAN A. FORD, *Appellant*.

OPINION No. 17850—Filed November 15, 1961

Moss, A. J.: Barbara D. Ford, the respondent herein, and Herman A. Ford, the appellant herein, were married on March 16, 1952, in Richmond, Virginia. Three children were born of this marriage and they were at the time of the institution of this action seven, five and three years of age, respectively.

The respondent did, on August 10, 1960, commence this action in the Greenville County Juvenile and Domestic Relations Court seeking custody of the three minor children of the marriage. The complaint alleged that the children were residing with the respondent in Greenville County, South Carolina, and that it was for the best interest of the said minor children that their custody be awarded to her. It is further alleged that the appellant had been guilty of misconduct and was an unfit person to have custody of the said children. The answer of the appellant alleges that the appellant and respondent are living separate and apart on account of the misconduct of the respondent. It is further alleged that the respondent is not a fit or proper person to have the custody of the said minor children by reason of her misconduct. The answer further alleges that the appellant is entitled to the custody of the said minor children of the marriage, he being a fit and proper person to have such custody and is financially able to provide for the educa-

tion, maintenance and support of the said children in a comfortable and desirable home in Sanford, North Carolina.

The answer further alleges that the appellant and respondent separated on August 25, 1959, and the respondent went to the home of her mother in Richmond, Virginia, the children remaining in North Carolina in the custody of the appellant. It is further alleged that on August 27, 1959, that the respondent took the children of the marriage from the State of North Carolina to the home of her mother in Richmond, Virginia. It is further alleged that on August 28, 1959, the appellant did, in the Law and Equity Court of the City of Richmond, Virginia, file a petition for a Writ of Habeas Corpus directing the respondent to produce the bodies of the three children before the Court at a time and place to be specified and to do and receive what shall then and there be considered by the Court concerning said children, and that the care, custody and possession of the said children be awarded to the appellant. An Order awarding a Writ of Habeas Corpus was issued by the Law and Equity Court of Richmond, Virginia, on August 28, 1959, directing the respondent to have and produce the bodies of the said children before the Court on September 2, 1959, and to abide the direction of the Court as to the custody of said children. The respondent filed a Return to the Writ of Habeas Corpus alleging that she was a fit and proper person to have the custody of the said infant children. She asked that the Writ be discharged as having been improvidently issued without probable cause.

The answer of the appellant further alleged that during the pendency of the Habeas Corpus proceeding in the Law and Equity Court of the City of Richmond, Virginia, both (fol. 196) parties being represented by competent legal counsel, an agreement was reached concerning the children of the marriage. Under the terms of the agreement, the appellant was given custody of the three children with the right to the respondent to have custody of the three children during the summer vacation from school and certain holiday periods. Under the consummation of the aforesaid agreement reached between the parties, a "Consent Dismissal" was had of the Habeas Corpus

proceeding instituted by the appellant. The Order of Dismissal by the Law and Equity Court of the City of Richmond, Virginia, filed November 18, 1959, was as follows:

> "It being represented to the court by counsel that the parties hereto have agreed concerning the custody of the infant children, it is ordered that this case be dismissed."

The instant case was tried before the Honorable J. Wilbur Hicks, Judge of the Greenville County Juvenile and Domestic Relations Court, and on December 8, 1960, he issued his order awarding the custody of the children to the respondent, with the provision that the appellant "shall have reasonable visitation rights and these shall include some holidays and school vacation periods and are to be agreed upon by the parties." The appellant duly excepted to the order of the Judge of the Juvenile and Domestic Relations Court and alleged error, *inter alia*, (1) That the Judge erred in failing to hold that the agreement previously made between the parties, through their respective counsel, at a time when an action was pending in the Law and Equity Court of the City of Richmond, Virginia, determined the question of custody and was binding upon the parties. It was asserted that the respondent admitted the making of such agreement and acknowledged that she was represented in such proceeding by able and competent counsel. It was further alleged as error that the court failed to hold that the agreed Order of Dismissal of the Law and Equity Court of the City of Richmond, Virginia, was *res judicata* as to the issue of custody before this Court. (2) That the Judge erred in failing to hold that the said agreement between the parties and the aforesaid agreed Order of Dismissal was binding and *res judicata*. It was further submitted that the Juvenile and Domestic Relations Court of Greenville County must recognize, in accordance with the full faith and credit clause of the Constitution of the United States, the agreed Order of Dismissal of the Virginia Court and that such was *res judicata* unless there was evidence of subsequent misconduct on the part of the appellant or a change of conditions warranting a

change of the custody of the children. (3) That the Judge erred in awarding the custody of the children to the respondent and giving the appellant only visitation rights to be agreed upon by the parties.

The appeal from the order of the Judge of the Juvenile and Domestic Relations Court of Greenville County was heard by the Honorable John Grimball, presiding Judge, on January 9, 1961, at a special Equity term of the Court of Common Pleas for Greenville County, South Carolina.

By an order dated February 25, 1961, the presiding Judge overruled the provision of the order of the Juvenile and Domestic Relations Court to the extent that he awarded the custody of the three minor children jointly to the respondent and the appellant, placing the custody of the said children in the respondent during the normal school year, commencing in September and ending in the early part of June of each year. He awarded custody of the three minor children to the appellant during the normal school holiday months, commencing in the early part of June and ending in the early part of September of each year. This order provided further that the appellant should have the custody and control of the children during the normal Christmas holidays of each school year. It was further provided that during the time that either the respondent or appellant had custody, the other party should be permitted to see or visit with the children at reasonable times and places. The presiding Judge refused to hold as *res judicata* the custody agreement reached by and between the parties, as a result of which the Habeas Corpus proceeding instituted by the appellant in the Law and Equity Court of the City of Richmond, Virginia, for the purpose of obtaining a custody of the minor children of the parties, was dismissed. He likewise refused to give full faith and credit to the agreed dismissal order of the Virginia Court. Within due time the appellant gave notice of intention to appeal to this Court from the order of the lower Court. The appellant asserts (fol. 197) that the trial Judge erred in refusing to hold as *res judicata* the "Consent Dismissed" order of the Law and Equity Court of the City of Richmond, Virginia, which was made after the

parties to this action had reached an agreement concerning the custody of the infant children here involved.

It is provided in Article IV, Section 1, of the Constitution of the United States; that:

> "Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

In the case of *Hamilton v. Patterson*, 236 S. C. 487, 115 S. E. (2d) 68, this Court said:

> "• • • Where a judgment rendered by a court having jurisdiction of the cause and the parties is challenged in another State, 'the full faith and credit clause of the Constitution precludes any inquiry into the merits of the cause of action, the logic or consistency of the decision, or the validity of the legal principles on which the judgment is based.' *Milliken v. Meyer*, 311 U. S. 457, 61 S. Ct. 339, 342, 85 L. Ed. 278. 'Because there is a full faith and credit clause a defendant may not a second time challenge the validity of the plaintiff's right which has ripened into a judgment.' *Magnolia Petroleum Co. v. Hunt*, 320 U. S. 430, 64 S. Ct. 208, 214, 88 L. Ed. 149, 150 A. L. R. 413.
>
> "This clause of the Federal Constitution U. S. Const. art. 4, section 1 and the Act of Congress which implements it 'require the judgments of the courts of one State to be given the same faith and credit in another State as they have by law or usage in the courts of the State rendering them.' *Morris v. Jones*, 329 U. S. 545, 67 S. Ct. 451, 454, 91 L. Ed. 488, 168 A. L. R. 656."

In order to make out the defense of *res judicata*, the following elements must be shown: (1) The parties must be the same or their privies; (2) The subject matter must be the same; and (3) While generally the precise point must be ruled, yet where the parties are the same or are in privity, the judgment is an absolute bar not only of what was decided but what might have

been decided. *Mackey v. Frazier*, 234 S. C. 81, 106 S. E. (2d) 895.

What was the effect of the agreed order under the Virginia Law and which came about as a result of a custody agreement reached between the parties with the advice and consent of their counsel? Does an agreed order of dismissal under the Virginia practice put an end to a pending suit and bars any subsequent suit on the same cause of action between the same parties? In the case of *Bardach Iron & Steel Co., Inc. v. Tenenbaum*, 136 Va. 163, 118 S. E. 502, the effect of an order "dismissed agreed" is fully discussed. The order there involved was "on motion of the plaintiff and with the consent of the defendant, this cause is dismissed agreed." The Virginia Court in discussing the effect of such order, said:

> "Ordinarily, the records of a court of record remain in the breast of the court, and subject to change or alteration by the court during the term at which they are made, but an order 'dismissed agreed' is an exception to the general rule. The court has no power to make such a record except by consent of the parties, and, having obtained such consent and made the entry, it is equally without power to set it aside without the consent of both parties, except upon some ground that would warrant the setting aside of other contracts of like nature. It is a contract of record that the court is without power to disturb except as stated. The court may correct its own errors, but cannot change the contracts of parties without their consent. *Deaver v. Jones*, 114 N. C. 649, 19 S. E. 637; *Hammond v. Place*, Har. (Mich.) 438. If the trial court was without power to set aside the order 'dismissed agreed' made on December 8, 1921, that was an end of the case. Such an order not only puts an end to the pending suit, but is a bar to any subsequent suit on the same cause of action, between the same parties, as fully as a retraxit would be.
>
> (fol. 198) " 'It is a declaration of record sanctioned by the judgment of the court, that the cause of action has been adjusted by the parties themselves, in their own way.' *Hoover v. Mitchell*, 25 Grat. (66 Va.) 387, 388; *Wohlford v. Compton*, 79 Va. 333; *Siron v. Ruleman*,

32 Grat. (73 Va.) 215, 223; *Jarboe v. Smith*, 10 B. Mon. (Ky.) 257, 52 Am. Dec. 541; *U. S. v. Parker*, 120 U. S. 89, 7 Sup. Ct. 454, 30 L. Ed. 601; *Simmons v. Yoho* (W. Va.), 115 S. E. 851, 857; 1 Freeman on Judgments, sec. 262; 2 Black on Judgments, sec. 706.

"In *Jarboe v. Smith*, 10 B. Mon. (Ky.) 257, 52 Am. Dec. 541, it is said to be a bar between the parties on the original cause of action, unless there is an express stipulation that another suit may be brought. In the judgment entered in *Hoover v. Mitchell*, supra, it is said that the dismissal of a suit agreed, without any explanation or qualification showing a contrary intention, is at least a prima facie determination of the matter controverted in that suit, but the opinion in the case holds that 'dismissed agreed' is equivalent to a retraxit. But to have this effect there must have first been an unqualified agreement that the suit should be 'dismissed agreed.'"

In the case of *Murden v. Wilbert*, et al., 189 Va. 358, 53 S. E. (2d) 42, it was held that the judgment of a court of competent jurisdiction dismissing a suit agreed, upon the ground that it had been agreed by the parties, is a final determination, as to those parties, of the matters litigated in that suit. It was further held that an order "dismissed agreed" is a contract of record that the court is without power to disturb except with consent of the parties.

In the case of *Hinton v. Norfolk & W. Ry. Co.*, 137 Va. 605, 120 S. E. 135, it appears that there was a mutual agreement to settle an action brought by an infant, by his next friend, by payment of the demand in full and was reported to the court and a motion was made by plaintiff to dismiss such action. The order stated that the action was "dismissed settled". The Court said:

"• • • Every distinguishing feature of a case 'dismissed agreed' appears, for there is the mutual agreement to terminate the case, which is reported to the court, and the consequent motion by the plaintiff to dismiss it. The consequences of such a dismissal are well understood and constitute a bar to a subsequent action between the same parties for the same cause.

"It is sufficient to cite the recent case of *Bardach I. & S. Co., Inc. v. Tenenbaum*, 136 Va. 163, 118 S. E. 502."

In the case of *Virginia Concrete Co. v. Board of Supervisors*, 197 Va. 821, 91 S. E. (2d) 415, the Virginia Court said:

"A retraxit is a voluntary renunciation by the plaintiff in open court of his suit and the cause thereof, and by it he forever loses his actions. 6 Mich. Jur., Dismissal, etc., sec. 35, p. 244; Burks Pl. & Pr., 4 ed., sec. 337, p. 646.

"An order 'dismissed agreed' not only puts an end to the pending suit, but is a bar to any subsequent suit on the same cause of action by the same parties 'as fully as a retraxit would be.' *Bardach Iron & Steel Co. v. Tenenbaum*, 136 Va. 163, 171, 118 S. E. 502, 505."

In this same Virginia Concrete Co. case it was further held that a dismissal order, even in general terms, which does not contain any reservation of right of either party to sue thereafter, is *res judicata* with respect to all matters covered by the pleadings of the case. The Court said:

"In *Wilcher v. Robertson*, 78 Va. 602, 618, it is likewise said that 'An order simply dismissing the suit is not a determination on the merits, and so is not a bar to the maintenance of a second suit for the same cause of action.' But in the earlier case of *Taylor v. Yarbrough*, 13 Grat. 183, 194, 54 Va. 183, 194, it was held that a decree which dismissed a bill in general terms and without any specification of grounds therefor, or reservation of a right to sue thereafter, must be taken to rest upon all the issues presented by the (fol. 199) pleadings and regarded as a final judgment of the entire right asserted. Much depends on the stage of the proceedings at which the order was entered and the reason for its entry. It is well, therefore, to heed the admonition in Lile's Equity Pl. & Pr., 3d ed., sec. 273, p. 157, that where the plaintiff voluntarily dismisses his suit or when it is dismissed involuntarily for reasons not affecting the merits of the case, the order should recite that the dismissal is 'without prejudice to plaintiff's right to institute such

further suits concerning the same matter as he may be advised,' in order to avoid a plea of *res judicata* in future litigation. See also *Newberry v. Ruffin*, 102 Va. 73, 76, 45 S. E. 733."

The North Carolina case of *Steele v. Beaty*, et al., 215 N. C. 680, 2 S. E. (2d) 854, was an action to recover damages for personal injuries alleged to have been caused by an assault by the defendants. The defendants pleaded settlement and a judgment in a former action based on the same cause of action. It appears that when the settlement was made that the order provided "Upon motion and by consent it is agreed that said action be, and the same is hereby dismissed." A judgment was rendered for the plaintiff and an appeal was prosecuted by the defendants. In reversing the judgment of the lower Court, the Supreme Court of North Carolina held that a "judgment of dismissal" entered by agreement of the parties pursuant to a compromise and settlement of the controversy is a judgment on the merits barring any other action for the same cause. It was further held that a "judgment in retraxit" is usually based upon and follows a settlement out of court, and like a judgment on the merits is a bar and estops plaintiff from again proceeding in another suit on the same cause of action. It was also held that the legal effect of an order dismissing a suit agreed is to bar any other suit between the same parties on the original cause of action, thus adjusted by them and merged in the judgment of the court, rendered at their instance, and in consequence of the agreement. We quote the following from this case:

"To hold that a judgment of dismissal by consent is not a bar would deny any effect whatever to the agreement of the parties and would treat the judgment of dismissal merely as a voluntary act of the plaintiff. *Doan v. Bush*, 130 Ark. 566, 198 S. W. 261, L. R. A. 1918B, 523. The legal deduction to be drawn from a judgment dismissing a suit by agreement of the parties is that the parties had by their agreement adjusted the subject matter of the controversy in that suit; and the legal effect of such a judgment is, therefore, that it will operate as a bar to any other

suit between the same parties on the identical cause of action then adjusted by them and merged in the judgment therein rendered at their instance and in consequence of their agreement."

In the case of *Yancey v. Yancey,* 230 N. C. 719, 55 S. E. (2d) 468, the husband brought an action against his wife to establish a resulting trust in realty. A previous action for the same cause had been dismissed and judgment entered "that the matters and things in controversy have been settled between the parties," and that, therefore, it was "adjudged and decreed that the plaintiff be nonsuited." The lower Court held that the previous judgment for the same cause, nonsuiting the plaintiff and reciting that the matters involved had been settled between the parties, was a bar to this action, citing the case of *Steele v. Beaty,* et al., supra. The Supreme Court of North Carolina affirmed the judgment of the lower Court. In the opinion, it is stated that the plaintiff admits the previous order above quoted. It is further stated that the plaintiff did not allege fraud, nor did he attack the judgment nor seek to vacate it. The Court said:

"• • • Hence standing upon the docket it is a judgment of retraxit, and it bars a new action. Before he can prosecute another action for the same cause he must in some proper way remove this judgment from his pathway. *Moody v. Wike,* 170 N. C. 541, 87 S. E. 350; *Fowler v. Fowler,* 190 N. C. 536, 130 S. E. 315; McIntosh Prac. & Pro. 745."

In the West Virginia case of *In Re McIntosh's Estate,* 109 S. E. (2d) 153, the Supreme Court of Appeals of the State, said:

(fol. 200) " • • • A judgment recording a compromise settlement and dismissing the action 'settled and agreed' is sufficient on which to found a res judicata plea. *Central Trust Co. v. Harless,* 108 W. Va. 618, 152 S. E. 209; *Murden v. Wilbert,* 189 Va. 358, 53 S. E. (2d) 42; 50 C. J. S. Judgments, sec. 634."

A review of the cases decided in Virginia convinces us that the Order of Dismissal by the Law and Equity Court of the City of Richmond, Virginia, was a "dismissed agreed" one

because it appears upon the face of the order that there was a settlement between the parties concerning the custody of the infant children and there was a mutual agreement to terminate the case. Such a judgment of dismissal entered by agreement of the parties, pursuant to a compromise or settlement of the controversy, is a judgment on the merits, barring another action for the same cause and is equivalent to a judgment of retraxit. If the respondent here had instituted in the Courts of Virginia the action commenced by her in the Courts of this State, the appellant could have successfully interposed a plea of *res judicata* as a defense to said action. Since the judgment entered in the Virginia Court by agreement or consent is *res judicata* in that State, it is *res judicata* and entitled to full faith and credit in this State. We are required under Art. IV, Sec. 1 of the Constitution of the United States to give the same faith and credit in this State to the "dismissed agreed" order or judgment as "by law or usage" the Courts of Virginia would give to such order or judgment.

It is undisputed that the parties in the Virginia proceeding are the same as the parties here. The issue before the Court in Virginia and in the Court here was which of the parties should have the custody of the three minor children. There is, therefore, an identity of parties and subject matter.

We should point out that we have held in a number of cases that changed circumstances may authorize the change of custody of minor children. We have held that the Court may at any time on the application of any interested party, or even on its own motion, upon sufficient showing, make further disposition of the custody of a child, if new facts and circumstances make it necessary or desirable for the child's welfare. A judicial award of the custody of a child is never final. *Ex Parte Atkinson,* 238 S. C. 521, 121 S. E. (2d) 4. Applying this rule to the instant case and after examining the pleadings and the entire record we find neither allegation nor proof of any changed circumstances authorizing a change of the custody of the minor children of the parties to this action.

Since we have reached the conclusion that the "dismissed agreed" order of the Law and Equity Court of the City of

Richmond, Virginia, is a bar to this action between the same parties for the same cause, in the absence of any allegation or proof of any changed circumstances requiring a change of the custody of the children here involved, the agreement reached by the parties prior to the order of the Virginia Court is still of full force and effect.

The exceptions of the appellant raise other issues which we find unnecessary to decide in view of the conclusion heretofore reached.

It is likewise unnecessary for us to consider the exception of the respondent to the order of the Honorable J. Robert Martin, Jr., granting the motion of the appellant to stay the execution of the order of the Juvenile and Domestic Relations Court of Greenville County.

Reversed.

Taylor, C. J., Legge and Lewis, JJ., concur. Oxner, J., dissents.

Oxner, J. (Dissenting): The Court holds that the consent order of the Virginia Court dismissing the habeas corpus proceedings instituted there after appellant and respondent had reached an agreement as to the custody of their children is a judgment which, under the Full Faith and Credit Clause of the Federal Constitution, precludes the courts of this State, in the absence of any change in (fol. 201) conditions, from inquiring into and determining what is for the welfare and best interests of these children. At the time this agreement was made the marital domicile of the parties was in North Carolina. Appellant continues to be a resident of that State. Under the view taken by the majority of the Court, not only would this order constitute, in the absence of a change in conditions, an adjudication binding on the courts of this State but also on those of North Carolina. I do not agree that it has such effect.

It is generally held that the judgment of a Court of one State as to custody of children must, in the absence of fraud or want of jurisdiction, be given full effect in every other State as to the facts before the Court at the time such judgment was rendered. *Hartley v. Blease*, 99 S. C. 92, 82 S. E. 991; An-

notation 116 A. L. R. 1299. The underlying reason for this was stated by Mr. Justice Frankfurter in a concurring opinion in *People of State of New York v. Halvey*, 330 U. S. 610, 67 S. Ct. 903, as follows: "The constitutional policy formulated by the Full Faith and Credit Clause cannot be fitted into tight little categories or too abstract generalities. That policy was the nationwide restriction of litigiousness, to the extent that States, autonomous for certain purposes, should not be exploited to permit repetitive litigation. In substance, the Farmers deemed it against the national welfare for a controversy that was truly litigated in one State to be relitigated in another. Such limitation does not foreclose inquiry into what was litigated and what was adjudicated."

In this proceeding respondent is not seeking to relitigate an issue which has been litigated in Virginia. The merits of the present controversy were never considered nor passed upon in that State. In fact, the agreement made between the parties was never exhibited to the Court. It follows that the order entered by the Virginia Court was not pronounced in the exercise of its judicial function. Such order, referred to in the Virginia decisions as an order "dismissed agreed", is apparently there regarded as binding on the parties because the courts "cannot change the contract of the parties without their consent." *Bardach Iron and Steel Co., Inc. v. Tenenbaum*, 136 Va. 163, 118 S. E. 502. This is in accord with the general rule that a judgment or decree, though entered by consent of the parties, is res judicata to the same extent as if entered after contest. *Norton v. Planters Fertilizer & Phosphate Co.*, 206 S. C. 119, 33 S. E. (2d) 247; Annotation 2 A. L. R. (2d) 514. I do not question the soundness of this principle when applied to an ordinary civil action. If this were purely a personal contest between the parties over a legal right, there would exist a basis for holding that the Virginia order is binding. But I do not think it is binding in another State in a proceeding relating to the custody of children. Such a proceeding is not to be judged, nor the results measured, altogether by technical rules that have to do with property rights. Like marriage, the custody of young children is of importance to the State. It is not

a property right of the parents. It is stated in 17A Am. Jur., page 31: "If the original award was made casually, pursuant to an agreement of the parties, and without a true judicial consideration of the facts, it is proper to consider the facts as they existed at the time the decree was entered in determining whether the order should be modified."

The reasons advanced in the Virginia decisions for the binding effect of an order "dismissed agreed" have no applicatio here. While these parties were at liberty to contract with each other with respect to the custody of their children, such a contract is not binding on the courts. It is always open to judicial inquiry as to whether such agreement is for the best interests of the children. "Parents have no 'property rights', in the ordinary sense of that term, in and to their minor children, and accordingly a parent's right of control or custody of a minor child is not a property right which may be bargained, sold, or otherwise disposed of." 67 C. J. S., page 636. As stated by Mr. Justice Jackson in his dissenting opinion in *May v. Anderson*, 345 U. S. 528, 73 S. Ct. 840: "Custody is viewed not with the idea of adjudicating rights *in* the children, as if they were chattels, but rather with the idea of making the best disposition possible for the welfare of the children."

In a case of this kind the rights of the parents are subordinate to the welfare of the children. *Graydon v. Graydon*, 150 S. C. 117; 147 S. E. 749. While their rights will be duly regarded, the paramount consideration is the best interests of the children. *Koon v. Koon*, 203 S. C. 556, 28 (fol. 202) S. E. (2d) 89; *West v. West*, 208 S. C. 1, 36 S. E. (2d) 856; *Dillon v. Dillon*, 219 S. C. 255, 64 S. E. (2d) 649. This paramount consideration is for determination by the courts and not by the parents. The contract between these parties entered into in Virginia does not under my view preclude the courts of this State from determining the question of custody or as to how custody should be divided between these parties. The children are lawfully in this State and, in my opinion, the question as to whether the agreement made by the parents is for their best welfare is open for judicial determination.

SUBJECT INDEX

Page

QUESTION PRESENTED 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 9

ARGUMENT

A. The Custody Decrees of One State Are Entitled to Full Faith and Credit in the Courts of Another State 11

B. The Custody Order of the Virginia Court Was a "Dismissed Agreed" Order 11

C. Under the Circumstances Presented a Virginia Court Would Not Modify the Virginia Order 16

D. The Opinion of the South Carolina Court Does Not Raise a Substantial Federal Question 22

CONCLUSION 26

APPENDIX A

Exemplified copy of the proceedings in the Superior Court of Lee County, North Carolina, in the cause entitled *H. Aubrey Ford, Jr. v. Barbara Dale Ford* 27

APPENDIX B

Order of the Honorable Emery B. Denny, Chief Justice of the Supreme Court of North Carolina, in the cause entitled *H. Aubrey Ford, Jr. v. Barbara Dale Ford*, dated August 24, 1962 75

TABLE OF CASES AND AUTHORITY

CASES: *Page*

Andrews v. Geyer,
200 Va. 107, 104 S.E. 2d 747 (1958) 19, 21

Bardach Iron & Steel Co. v. Tenenbaum,
136 Va. 163, 118 S.E. 502 (1923) 18

Boone v. Boone,
150 F. 2d 153 (D.C. Cir. 1945) 13

Busbee v. Reese,
125 S.C. 121, 118 S.E. 185 (1923) 22

Campbell v. Campbell,
203 Va. 61, 122 S.E. 2d 658 (1961) 19

Cantrell v. Cantrell,
143 W. Va. 826, 106 S.E. 2d 768 (1958) 12

Cook v. Cook,
342 U. S. 126, 72 Sup. Ct. 157, 96 L. Ed. 146 (1951) 16

Hartley v. Blease,
99 S.C. 92, 82 S.E. 991 (1914) 22

Helton v. Crawley,
241 Iowa 296, 41 N.W. 2d 60 (1950). 12

Hinton v. Norfolk & W. Ry.,
137 Va. 605, 120 S.E. 135 (1923) 16

Kovacs v. Brewer,
356 U.S. 604, 78 Sup. Ct. 963, 2 L. Ed. 2d 1008 (1958) 11

Martin v. Martin,
167 Va. 206, 188 S.E. 148 (1936) 15, 17

CASES (Continued): Page

May v. Anderson,
345 U.S. 528, 73 Sup. Ct. 840, 97 L. Ed. 1221 (1953) 11, 25

New York ex rel. Halvey v. Halvey,
330 U.S. 610, 67 Sup. Ct. 903, 91 L. Ed. 1133 (1947) 11, 13

People ex rel. Koelsch v. Rone,
3 Ill. 2d 483, 121 N.E. 2d 738 (1954) 12

Powell v. Powell,
231 S.C. 283, 98 S.E. 2d 764 (1957) 25

Semmes v. Semmes,
201 Va. 117, 109 S.E. 2d 545 (1959) 20, 21

Sutera v. Sutera,
1 A.D. 2d 356, 150 N.Y.S. 2d 448 (1956) 12, 21

Virginia Concrete Co. v. Board of Supervisors,
197 Va. 821, 91 S.E. 2d 415 (1956) 17

Ex parte White,
49 Cal. App. 2d 160, 121 P. 2d 100; 54 Cal. App. 2d 637, 129 P. 2d 706 (1942) 13

OTHER AUTHORITY:

28 U.S.C. § 1738 12

Supreme Court Of The United States

OCTOBER TERM, 1962

No. 63

BARBARA D. FORD,

Petitioner,

v.

HERMAN A. FORD,

Respondent.

BRIEF OF RESPONDENT

QUESTION PRESENTED

The "Question Involved" stated by Petitioner contains a faulty description of the Virginia order and a faulty paraphrase of what was held by the Supreme Court of South Carolina. Although we doubt the necessity of decision of the point, we restate the Question thus:

Is a "dismissed agreed" order of a Virginia court, entered on the motion of both parties in a custody proceeding, entitled to full faith and credit in the courts of South Carolina in a proceeding in which there is neither allegation nor proof of changed circumstances?

STATEMENT OF THE CASE

Similarly, because Petitioner has repeatedly omitted, minimized, colored, and otherwise altered by argumentative construction the underlying facts of this controversy, it becomes

necessary to restate for the Court the salient facts as disclosed by the record.

Petitioner and Respondent were married in 1952, and three children were born of this marriage. (R. 66-67, 134-135.) Respondent was employed by a tobacco company, and his employment required him to travel frequently. However, as a result of the death in 1957 of a co-employee, who was employed at the Sanford, North Carolina, office of the tobacco company, Respondent and Petitioner established their permanent home in Sanford in January, 1958. (R. 67, 137-138.)

During the first week of July, 1959, while vacationing in Gloucester, Virginia, with her children, Petitioner began an adulterous affair with a married man which is lightly alluded to by Petitioner in her Brief as a "marital difficulty". (R. 70; Pet.'s Brief 3.) This performance in Gloucester, in a trailer near Richmond, and in a motel at Bowling Green, Virginia, continued over a period of about six weeks. (R. 86-93.) Respondent then learned of his wife's infidelity, which she admitted (R. 71, 153-154), and, a few days later, Petitioner and Respondent went to Richmond to discuss the problem with their respective families. (R. 72, 150.) Respondent left Petitioner at her mother's residence in Richmond and on the following day returned to see Petitioner, but he saw only Petitioner's mother. (R. 156-157.) From the conversation Respondent correctly inferred that Petitioner had returned to North Carolina to get the three children. (R. 73-74.) Being apprehensive, Respondent then arranged by telephone for the children to be moved to Fayetteville, North Carolina, in the company of the parties' German maid, where they were promptly joined by Respondent and his mother. (R. 156, 163.) However, Petitioner, accompanied by her sister, discovered the whereabouts of the children in Fayetteville, and the next morning -immediately after Re-

spondent had left for his office in Sanford took the children and drove off with them to Richmond over the protestations of Respondent's mother. (R. 17, 73-74, 96, 163.)

The next day, August 28, 1959, Respondent instituted a habeas corpus proceeding in the Law and Equity Court of the City of Richmond, Virginia, seeking custody of his children, and he alleged in his petition that his wife had "been guilty of acts which were not only of a nature that would justify . . . [his] seeking a divorce from her but which render[ed] her unfit to have the custody of said children." (R. 15-19.) Respondent also alleged that "the best interests of said children would be promoted by them being forthwith returned to the care, custody and control of . . . [Respondent]." (R. 18.)

Petitioner's return to the writ of habeas corpus, filed September 2, 1959, stated that the children were thereby produced, though by stipulation were not physically present, alleged that she was and had been a fit and proper person to have custody of the said infant children and that the writ of habeas corpus had been "issued improvidently and without probable cause." (R. 19-20.) Thereafter, extended negotiations between Petitioner and Respondent, both represented by the Richmond, Virginia, counsel who appear on the briefs in this case, resulted in a detailed agreement between them regarding custody of the three children. This agreement was reduced to writing in the form of correspondence between counsel and was admitted by Petitioner in her testimony in this case in which she endeavors to nullify it. (R. 11-15, 74-75.) Thereafter, *upon motion of counsel for both parties*, the Law and Equity Court of the City of Richmond, on November 18, 1959, under the Virginia practice, entered a "dismissed agreed" order which provided:

"It being represented to the court by counsel that the parties hereto have agreed concerning the custody of the infant children, it is ordered that this case be dismissed."[1]

By the agreement custody of the children was granted to Respondent except that, during summers and part of the Christmas holidays, custody was granted to Petitioner. (R. 12-15.)

During the next summer and according to the provisions of the agreement, the children were with Petitioner in Greenville, South Carolina, to which she had moved following the break-up of the home. On August 10, 1960, Respondent went to Greenville to inform his children of the death of their grandmother, Respondent's mother. Upon arriving at Petitioner's apartment, Respondent was served with the complaint in this case, whereby Petitioner sought custody of the children. (R. 145-146.) In his answer, Respondent alleged that he was entitled to custody and that Petitioner had thus "violated and breached the agreement made between the parties by and with their respective legal counsel and further violated the Order of the Court of record in Richmond, Virginia that was duly issued and based upon said agreement." (R. 8-9.) Respondent further alleged that Petitioner "was guilty of gross misconduct during the time . . . [Petitioner and Respondent] resided as husband and wife and such gross misconduct included acts of adultery on numerous occasions during July and August, 1959 in Gloucester, Virginia, Chesterfield County, Virginia and a motel at Bowling Green, Virginia with a married man who resides in Richmond, Virginia." (R. 10.)

1. A true copy of this order of dismissal, including the *joint* motion of counsel requesting its entry (which was erroneously omitted in printing the Transcript of Record), may be found *infra*, Appendix A, p. 53.

Petitioner's Brief (p. 8), in "recapitulating the uncontroverted facts and circumstances of this litigation . . .", contains the following statement:

> "the proceeding in South Carolina was instituted when the [P]etitioner and all three children were, and had been for several months, domiciled in Greenville County, South Carolina (R. 76, 143, 144) . . . ."

Also, in Petitioner's Brief (p. 18), it is stated:

> "The children involved herein were domiciled in South Carolina when the proceeding was instituted in the Juvenile and Domestic Relations Court . . . ."

These statements are only two of the argumentative distortions, disguised as fact, with which Petitioner's Brief is replete. The children were not domiciled in South Carolina but were there because Petitioner was living there, and Respondent, with scrupulous regard for the custody agreement, brought them to South Carolina about June 20 to be with her for the summer vacation. (R. 76, 142-144.) By her own testimony Petitioner admitted that Respondent "in every sense of the word . . . was acting as he had agreed to do." (R. 97-98.)

During the hearing in October, 1960, the judge of the Juvenile and Domestic Relations Court stated:

> "both parties are good people, good family, good parents. I am going to exclude any further testimony as to their faithfulness as parents." (R. 118-119.)

However, on December 8, 1960, the judge filed his order in the case which awarded *sole* custody of the children to Petitioner, subject only to "reasonable visitation rights" of Respondent. (R. 28.) The order of the Juvenile and Domestic Relations Court held that the prior "dismissed agreed" order of the Law and Equity Court of the City of Richmond, Virginia, was "a mere order of dismissal." (R. 25.)

Respondent appealed this order to the Court of Common Pleas for Greenville County, South Carolina, which Peti-

tioner says in her Brief (p. 3) "affirmed with minor modifications." This again is less than candid, because after a hearing on January 9, 1961, on the record in the lower court, the Court of Common Pleas on February 25, 1961, awarded custody of the children to Petitioner and Respondent *jointly*. (R. 190.) In effect, the Court of Common Pleas transposed the provisions of the Virginia agreement and awarded custody during the normal school year to Petitioner and custody during the normal holiday months and normal Christmas holidays to Respondent. However, the court stated in its order:

> "I agree with the Judge of the Juvenile and Domestic Relations Court that the custody of these three minor children *may well be left in the hands of either the plaintiff* [Petitioner] *or the defendant* [Respondent]." (R. 187.) (Emphasis added.)

An appeal by Respondent to the Supreme Court of South Carolina resulted in a reversal of the Court of Common Pleas and a reinstatement of the Virginia agreement upon which the "dismissed agreed" order of the Law and Equity Court of the City of Richmond was based. In concluding its opinion, the Supreme Court of South Carolina referred to the Virginia "dismissed agreed" order, stating:

> "Such a judgment of dismissal entered by agreement of the parties, pursuant to a compromise or settlement of the controversy, is a judgment on the merits, barring another action for the same cause and is equivalent to a judgment of retraxit. If the respondent here had instituted in the Courts of Virginia, the action commenced by her in the Courts of this State, the appellant could have successfully interposed a plea of *res judicata* as a defense to said action. Since the judgment entered in the Virginia Court by agreement or consent is *res judicata* in that State, it is *res judicata* and entitled to full faith and credit in this State. We are required under Art. IV, Sec. 1 of the Constitution of the United States to give the same faith and credit in this State to the

'dismissed agreed' order or judgment as 'by law or usage' the Courts of Virginia would give to such order or judgment.

* * *

"... We have held that the Court may at any time on the application of any interested party, or even on its own motion, upon sufficient showing, make further disposition of the custody of a child, if new facts and circumstances make it necessary or desirable for the child's welfare. A judicial award of the custody of a child is never final. Ex Parte Atkinson, 238 S.C. 521, 121 S.E. (2d) 4. *Applying this rule to the instant case and after examining the pleadings and the entire record we find neither allegation nor proof of any changed circumstances authorizing a change of the custody of the minor children of the parties to this action.*

"Since we have reached the conclusion that the 'dismissed agreed' order of the Law and Equity Court of the City of Richmond, Virginia, is a bar to this action between the same parties for the same cause, *in the absence of any allegation or proof of any changed circumstances requiring a change of the custody of the children here involved*, the agreement reached by the parties prior to the order of the Virginia Court is still of full force and effect."[2]

One further development since certiorari was granted herein should be brought to the Court's attention for a full understanding of this case. While this proceeding was pending in the South Carolina courts, Respondent in December 1960 instituted a divorce action against Petitioner in the Superior Court of Lee County, North Carolina, (that being the matrimonial domicile) on the ground of adultery and sought an order of custody of the infant children, who were then residing with him. In May 1962, more than two years having elapsed since the separation of the parties, Respondent filed his amended complaint alleging a second cause of action

2. R. 205-206, 239 S.C. at , 123 S.E. 2d at 39. (Emphasis added.)

for divorce in accordance with the North Carolina statute, to-wit, continuous separation of the parties since August 25, 1959.

Respondent did not ask for trial of his action for divorce and custody, but prior to the May Term 1962 of the Superior Court of Lee County, North Carolina, and while this case was pending in this Court, counsel for Petitioner (the defendant therein) moved the North Carolina court that the case "be ordered calendared and tried at the earliest possible date." Accordingly, that court ordered that "this matter be peremptorily set for trial as the first contested case in Lee County Superior Court for the term beginning August 6, 1962."[3] During the trial Petitioner urged that full faith and credit should be given to the order of the Court of Common Pleas for Greenville County, South Carolina, but the court awarded custody in accordance with the agreement reached in Virginia in 1959 and made the following finding (among others):

> "that upon this hearing on custody this day and upon inquiry by the Court, both parties by counsel disaffirmed any contention of and did not offer to show any change of circumstances of the parties since their agreement and the entry of the 'dismissed agreed' order of the Virginia Court that would justify this Court in making any change in the custody arrangements in said agreement, *which terms of agreement meet with the approval of this Court, and this Court finds that such custodial arrangement is in the best interest of said infant children.*"[4]

All of the foregoing will appear from an exemplified copy of the proceedings in the Superior Court of Lee County, North Carolina, in the cause entitled *H. Aubrey Ford, Jr. v. Barbara Dale Ford;* which is printed and filed with Respond-

3. Appendix A, p. 64.
4. Appendix A, p. 68. (Emphasis added.)

ent's Brief as *Appendix A*. The judgment of the Superior Court in such cause, dated August 9, 1962, was suspended and stayed by an order of the Honorable Emery B. Denny, Chief Justice of the Supreme Court of North Carolina, dated August 24, 1962, pending appeal to that court, and a true copy of such order is printed and filed with Respondent's Brief as *Appendix B*.

Thus, it appears that a uniform result now exists in the three states before whose courts this custody matter has been brought, *i.e.*, Virginia, South Carolina, and North Carolina.

SUMMARY OF ARGUMENT

The policy and requirements of the Full Faith and Credit Clause are equally as strong in the area of child custody as in other areas. The forum should treat a prior custody decree of a sister state with the same respect which would be given it by the courts of the state of its origin, and the forum should modify it only upon such terms as would be required in the state of its origin. Any other rule would lead to chaos and forum-shopping in this sensitive area where the stability of children is such a necessary factor in their welfare. The forum, therefore, should examine the "law or usage" of the courts of the state in which the prior decree originated and should be governed by such "law or usage."

The Supreme Court of South Carolina properly found that the order of dismissal entered by the Law and Equity Court of the City of Richmond, Virginia, was a "dismissed agreed" order under Virginia practice. The parties before the Virginia court, by their joint motion, reported that they had reached agreement settling the issue before the court

(the custody of the children) and asked that the case be dismissed, whereupon the case was dismissed by the court. The Supreme Court of South Carolina also correctly found that such an order of dismissal was *res judicata* of the issue before the Virginia court. Under Virginia practice such an order entered in a child custody case may be modified only upon proof of a subsequent change in circumstances which require a modification in the interest of the child's welfare. No such changed circumstances were alleged or proved in this case. Therefore, the South Carolina court properly refused to change the custody status established by the Virginia order.

However, the constitutional issues argued by Petitioner need not be decided in this case because the Supreme Court of South Carolina demonstrated in its opinion that it did not consider itself finally and forever bound by the Virginia order in its determination of the children's custody. It examined the Virginia proceedings only for the purpose of determining whether the Virginia order had judicially established the children's custody as of the date of its issuance. Finding such to be the case, it then applied *South Carolina law* to determine whether the custody status thus established should be modified, and it held that Petitioner had established no basis for a change or modification under such law. Therefore, the case thus presented to this Court does not raise a substantial federal question under the Full Faith and Credit Clause.

ARGUMENT

A.

THE CUSTODY DECREES OF ONE STATE ARE ENTITLED TO FULL FAITH AND CREDIT IN THE COURTS OF ANOTHER STATE

In her presentation of the "Question Involved", Petitioner assumes argumentatively that the Virginia order was found to "preclude the courts of the State of South Carolina from awarding custody based upon the best interest of the children" (Pet.'s Brief 3); and the same faulty premise is pursued through pages of argument to the conclusion where Petitioner "submit[s] that the South Carolina Court was not required by Article IV, Section I of the Constitution of the United States to grant full faith and credit to the order of the Law and Equity Court of the City of Richmond, Virginia . . . ." (Pet.'s Brief 18.)

In this manner Petitioner strains to raise a constitutional question of substance in order to come within the certiorari jurisdiction of this Court. As will be seen later in this Brief, we respectfully submit that—without doing violence to the Virginia practice and that of other states and without running grave risks which are inherent in the argument of Points I and II of Petitioner's Brief—this is not the case in which this Court will find it necessary to decide the "difficult and important" question of constitutional law upon which this Court has reserved decision in three cases that have been before it in the last fifteen years.[5]

However, if the Court concludes that this is a case in which it becomes necessary to decide the question, then it is respectfully submitted that there can be but one answer in an or-

5. See Kovacs v. Brewer, 356 U.S. 604 (1958); May v. Anderson, 345 U.S. 528 (1953); New York *ex rel.* Halvey v. Halvey, 330 U.S. 610 (1947).

derly society. The Full Faith and Credit Clause and its implementing statute[6] apply to all "judicial proceedings" of a sister state. Custody proceedings are judicial proceedings.

Broadly stated, the earlier custody decree of a sister state must be accepted by the forum as a determination of the child's custody on the date of the decree. The courts of the various states have developed rules with regard to modifying one of their *own* prior decrees. The universal rule is that inquiry must be limited to facts and circumstances which have developed since the former decree. By all standards, this rule must also be held to apply to decrees of a sister state in accordance with the constitutional mandate.[7]

6. 28 U.S.C. § 1738.

7. See, *e.g.*, Cantrell v. Cantrell, 143 W. Va. 826, 106 S.E. 2d 768 (1958); People *ex rel.* Koelsch v. Rone, 3 Ill. 2d 483, 121 N.E. 2d 738 (1954); Helton v. Crawley, 241 Iowa 296, 41 N.W. 2d 60 (1950); Sutera v. Sutera, 1 A.D. 2d 356, 150 N.Y.S. 2d 448 (1956). In People *ex rel.* Koelsch v. Rone, *supra* at 485, 121 N.E. 2d at 740, the court said:

> "[T]he order of the Massachusetts court, modifying the divorce decree and awarding custody to relator, must be recognized and given full faith and credit by the courts of this State if the Massachusetts court then had jurisdiction over the parties and subject-matter.
>
> "... The requirement of full faith and credit for judgments affecting custody of children depends upon the effect which they are accorded in the State where they were rendered."

In Cantrell v. Cantrell, *supra*, the West Virginia court considered the effect to be given a prior Indiana custody decree entered after "a colloquy between the Judge and the plaintiff's counsel" in a hearing where "no evidence was produced by plaintiff in support of his prayer." The court held that it could not go behind the decree. "It appears to be regular upon its face, and cannot be collaterally attacked in this proceeding." *Id.* at 828, 106 S.E. 2d at 769. The court gave full faith and credit to the Indiana decree, stating that:

> "[S]ince the foreign custody decree is usually regarded as *res judicata* as to conditions as they existed at the time the foreign decree was rendered, only matters that have occurred subsequent to the foreign custody decree can be litigated in the new decision.
>
> "Accordingly, upon a hearing of this matter the trial court should disregard the voluminous allegations of misconduct and unfitness of either of the parents prior to the rendition of the second custodial decree of the Circuit Court of Madison County,

Were more latitude allowed to the courts of the forum than to the courts of the sister state to modify the custody decrees of the latter, an incentive for abduction would exist so long as one parent was dissatisfied. Chaos would ensue, for a prior custody decree would have no more sanctity than custody obtained by stealth, force, fraud, or an order of a court without jurisdiction. Instability would follow, and the courts of more than fifty jurisdictions might be called upon to independently consider the same facts, thereby encouraging "unseemly litigious competition between the states and their respective courts as well as between parents."[8] Thus, as has occurred in the history of litigation between these parties, custody might be awarded to Respondent by a Virginia court into whose jurisdiction Petitioner had clandestinely removed the children; to Petitioner by a South Carolina court[9] in whose jurisdiction the children were temporarily visiting pursuant to the agreement upon which the Virginia order had been founded; and, most recently, to Respondent by a North Carolina court[10] in a divorce action instituted by Respondent in the parties' matrimonial domicile and brought

> Indiana, and *should limit the present inquiry to relevant facts and circumstances which may be shown to have occurred since that time affecting the welfare of the children, and which may or may not justify a change in their custody.*" *Id.* at 836, 106 S.E. 2d at 773. (Emphasis added.)

Petitioner in her Brief (pp. 9-10) has cited two cases as authority for her argument that such an order is not entitled to full faith and credit. Neither of these cases support her. Boone v. Boone, 150 F. 2d 153 (D.C. Cir. 1945), did not involve a consent decree at any stage of litigation, and Petitioner's quotation is pure *dictum*. *Ex parte* White, 49 Cal. App. 2d 160, 121 P. 2d 100 (1942) (referring case to referee), and 54 Cal. App. 2d 637, 129 P. 2d 706 (1942) (confirming referee's report), did not even deal with the decree of a sister state, much less a consent decree.

8. New York *ex rel.* Halvey v. Halvey, 330 U.S. 610 at 620 (1947) (Rutledge, J., concurring).

9. This custody decree was reversed by the Supreme Court of South Carolina whose decision is here before this Court on writ of certiorari.

10. See Appendix A, pp. 65-71.

on for early trial during the pendency of this case before this Court at the insistence of Petitioner.[11]

These conflicts should be removed by a proper application of the Ful Faith and Credit Clause. Petitioner agrees when her desire are thereby served. After raising this constitutional question in her petition for certiorari, and after certiorari was granted, Petitioner urged the Superior Court of Lee County, North Carolina, to give full faith and credit to the decree of the Court of Common Pleas for Greenville County, South Carolina, the decree of the lower court in this case.[12]

Accordingly, in order to avoid the effect of the constitutional mandate—which Petitioner urged the North Carolina court to apply in her favor—attack is now made upon the Virginia order itself. It is contended that it is not an order which the Virginia courts would have treated as *res judicata*, and consequently South Carolina was not required to so treat it. Consideration of the Virginia decisions does not support Petitioner's argument.

B.

THE CUSTODY ORDER OF THE VIRGINIA COURT WAS A "DISMISSED AGREED" ORDER

Petitioner's attempt in Point II of her brief to create doubt that the Virginia order was a "dismissed agreed" order under

11. See Order of Superior Court of Lee County, North Carolina, reprinted Appendix A, p. 64, hereof, wherein the North Carolina case was set for trial on motion of counsel for Barbara Dale Ford on the "earliest possible date."

12. Appendix A, p. 69. This contention by Petitioner, made by her South Carolina counsel within two weeks of filing her Brief in this Court, is diametrically opposed to her argument "that the Full Faith and Credit Clause does not preclude the free exercise of, or interposition of the *parens patriae* jurisdiction of a state . . . ." (Pet.'s Brief 17.)

Virginia practice is pure sophistry. Counsel on her Brief who joined in the motion for the order know its intended import, and in her Brief she admits its nature and effect by conceding that it is an order which the "South Carolina Court may, if it sees fit, recognize as a matter of local law . . ." (Pet.'s Brief 7.)

Petitioner argues, first, that the order merely dismisses the case, "omitting the word 'agreed'." (Pet.'s Brief 14.) The order of the Virginia court belies this argument. It provided:

> "It being represented to the court by counsel that the parties have *agreed* concerning the custody of the infant children, *it is ordered that this case be dismissed.*"[13]

It is apparent from the very language of the order that the parties had "agreed" and upon the agreement Petitioner joined in asking the court to enter the order.

If Petitioner intends to tell the Court that under Virginia law the words "dismissed" and "agreed" must appear in juxtaposition, there is no authority in the Virginia cases for such a proposition. To argue it here is an attempt to exalt form over substance—to make a distinction without a difference. In fact, in the case of *Martin v. Martin*, 167 Va. 206, 188 S.E. 148 (1936), cited and discussed by Petitioner (Pet.'s Brief 14, 15), an order which did not contain the words "dismissed" or "agreed" was held to be a "dismissed agreed" order.

Secondly, Petitioner argues that "it appears from the order that the terms of the agreement were never revealed to the court". (Pet.'s Brief 14.) Nothing of the kind "appears from the order."[14] But in any event, the argument is devoid of legal significance. There is no authority for the proposition that the terms of the agreement must be revealed to the court. All that is required is that the parties *report* to

13. R. 20; Appendix A, p. 53. (Emphasis added.)

14. That it was not, in fact, revealed to the Virginia court was conceded during the hearing in South Carolina. (R. 25.)

the court the fact that they have reached an agreement whereby the controversy has been settled, wherefore the court is asked to dismiss the suit. "Reported" and "revealed" are not synonymous.

In *Hinton v. Norfolk & W. Ry.*, 137 Va. 605, 120 S.E. 135 (1923), the Supreme Court of Appeals of Virginia described a case as having been "dismissed agreed" where

> "Every distinguishing feature of a case 'dismissed agreed' appears, for there is the mutual agreement to terminate the case, which is *reported* to the court, and the consequent motion by the plaintiff to dismiss it."[15]

In the instant case Petitioner has admitted her agreement and its terms (R. 74-75), and upon representation of this agreement and upon motion of *both parties*, the case was dismissed by the Virginia court.[16]

The Supreme Court of South Carolina carefully considered the Virginia order and the authorities. It held this to be a "dismissed agreed" order under the "law or usage in the courts" of Virginia, and its conclusion is amply supported by the authorities; and, as Mr. Justice Douglas said in *Cook v. Cook*, 342 U.S. 126 (1951):

> "the burden of undermining the decree of a sister state 'rests heavily upon the assailant.'"[17]

C.

UNDER THE CIRCUMSTANCES PRESENTED A VIRGINIA COURT WOULD NOT MODIFY THE VIRGINIA ORDER

Under the "law or usage in the courts" of Virginia, a "dismissed agreed" order bars subsequent proceedings between the same parties involving the same issues. This is a cardinal principle in Virginia law, *and none of the cases cited by Peti-*

15. 137 Va. at 609, 120 S.E. at 136. (Emphasis added.)
16. See Appendix A, p. 53.
17. 342 U.S. at 128.

tioner in her brief hold or indicate otherwise.[18]

This rule is nowhere better or more succinctly stated than in *Martin v. Martin*, 167 Va. 206, 211, 188 S.E. 148, 150 (1936), where the Virginia court said:

> "The judgment of a court of competent jurisdiction, dismissing a suit agreed, on the ground that it has been agreed by the parties, is a final determination of the matters which were actually, or might have been litigated in that suit, as against said parties and all claiming under them. *Hoover v. Mitchell*, 25 Gratt. (66 Va.) 387; *Wilcher v. Robertson*, 78 Va. 602; *Wohlford v. Compton*, 79 Va. 333."

But Petitioner insinuates doubt about this rule by stating Pet.'s Brief 12, n. 8):

> "While a number of decisions of the Supreme Court of Appeals of Virginia have discussed 'dismissed agreed' orders, in only four discovered cases has such an order been held to be a bar to a succeeding action. . . . [citing four cases]. Other cases involving or mentioning such orders are: . . . [citing eight cases]."

Petitioner is not candid with the Court. She should also say that in *no* Virginia case involving a valid "dismissed agreed" order has the Supreme Court of Appeals of Virginia *failed* to hold that such an order was a bar to a succeeding action between the same parties involving the same issues.

18. It is also clear under the authority of the most recent Virginia decision relating to the finality of judicial orders that any order of dismissal in Virginia *which does not contain a reservation of right* by the plaintiff to bring another proceeding relating to the same matter, is *res judicata* in that state. In its footnote to Virginia Concrete Co. v. Board of Supervisors, 197 Va. 821, 826, 91 S.E. 2d 115, 119 (1956), the Supreme Court of Appeals of Virginia said:

> "It is well, therefore, to heed the admonition in Lile's Equity Pl. & Pr., 3d ed., § 273, p. 157, that where the plaintiff voluntarily dismisses his suit or when it is dismissed involuntarily for reasons not affecting the merits of the case, *the order should recite that the dismissal is 'without prejudice to plaintiff's right to institute such further suits concerning the same matter as he may be advised,'* in order to avoid a plea of *res judicata* in future litigation." (Emphasis added.)

To avoid the effect of a "dismissed agreed" order in a custody case, Petitioner cites language from *Bardach Iron & Steel Co. v. Tenenbaum*, 136 Va. 163, 118 S.E. 502 (1923) (Pet.'s Brief 15), wherein a "dismissed agreed" order is likened to that of a contract between the parties. But she does not say that the court in that case goes on:

> "It is a contract of record that the court is without power to disturb except as stated. The court may correct its own errors, but cannot change the contracts of parties without their consent. . . . *'It is a declaration of record, sanctioned by the judgment of the court*, that the cause of action has been adjusted by the parties themselves in their own way.' "[19]

Petitioner then cites authority which states that a court can not be bound by a contract between the parties on the question of the custody of children. Pet.'s Brief 16.

The binding effect of a "dismissed agreed" order is more than that of an ordinary contract. "It is a declaration of record, *sanctioned by the judgment of the court*."[20] It is in no sense the type of contract to which the Virginia court refers in the cases cited by Petitioner. Those were not contracts made in settlement of custody issues *then pending before a court of record* as was true here.

When the agreement which formed the basis for the Virginia order was entered into, the Virginia court had the issues before it. It had jurisdiction over the parties and the custody and welfare of the children. It had the power either to grant or to deny the motion for dismissal made by both parties. It had the power to make the agreement *res judicata* or not, as it deemed best. To contend otherwise, or to liken this to the cases cited by Petitioner, is to say that the Law and Equity Court of the City of Richmond, Virginia, abdicated its responsibilities on Petitioner's own motion which

19. 136 Va. at 171, 118 S.E. at 504-505. (Emphasis added.)
20. *Id.* at 171, 118 S.E. at 505. (Emphasis added.)

she now says "subverted" the "children's welfare." (Pet.'s Brief 9.)

The rule in Virginia with regard to modifying a custody decree is that the decree is *res judicata* as to facts occurring prior to its issuance, and it can be altered only where *subsequent* facts would so dictate. As stated by the Supreme Court of Appeals of Virginia in *Campbell v. Campbell*, 203 Va. 61, 64, 122 S.E. 2d 658, 661 (1961):

> "Section 20-108, Code of 1950, 1960 Replacement Volume, gives the court continuing jurisdiction to change or modify its decree as to the custody and maintenance of minor children, and *if in the future conditions materially change affecting the welfare of the children* the court has the authority to change or modify the decree at any time to meet the changed conditions." (Emphasis added.)

Two recent Virginia cases regarding modification of custody decrees are indicative of what the Virginia court would do in this case. In the first case, *Andrews v. Geyer*, 200 Va. 107, 104 S.E. 2d 747 (1958), the parties had *stipulated a custody agreement* whereby custody of an infant child would be awarded to its father subject to the right of the mother to have the child each summer and during certain holiday periods. A divorce decree was awarded to the father on the basis of the mother's desertion, and *custody was awarded in accordance with the stipulated agreement*. Several years later the mother sought modification of the decree to the extent of obtaining exclusive custody of the child. The mother alleged that the father's remarriage had created a situation to which the child should not be subjected. The trial court modified its earlier decree and awarded full custody to the father.

The decision of the trial court was reversed on appeal, and the *original stipulated custody provisions were reinstated*. The Supreme Court of Appeals of Virginia stated:

> "Clearly, Mrs. Andrews [*the mother*] *utterly failed to show that there had been such change in condition as would warrant the court in giving her the sole custody of her son.* She had abandoned her husband and child in the first instance, and the decree of divorce was based on this abandonment. *She was found to be the guilty party and had agreed to the custody provisions outlined in the decree.*"[21]

In the second case, *Semmes v. Semmes*, 201 Va. 117, 109 S.E. 2d 545 (1959), the parties executed *a property settlement and custody agreement* which awarded custody of their infant daughter to the father except for three summer months. The parties were subsequently divorced, and the provisions of the agreement were incorporated in the decree. Two years later and after the mother had remarried, she sought full custody of her daughter, but the trial court modified its earlier decree and left custody with the father, reducing the period during which the daughter would visit her mother from three months to three weeks.

After the father had remarried, the mother again sought full custody. In commenting on the evidence, the trial court stated:

> "'In other words, *the evidence shows that with either parent the child would have a suitable home, a good education, a normal and healthy environment, and suitable and loving parents.*[22]
>
> "'This being the case, what considerations would justify an alteration of the present arrangement? Certainly, the Court cannot from time to time hear evidence and make a determination that both homes are

21. 200 Va. at 112, 104 S.E. 2d at 751. (Emphasis added.)

22. Identical findings were made in this case by the lower South Carolina courts. The Juvenile and Domestic Relations Court found that "both parties are good people, good family, good parents" (R. 118), and the Court of Common Pleas for Greenville County found that "the custody of these three minor children may well be left in the hands of either the plaintiff [Petitioner] or the defendant [Respondent]." (R. 187)

> suitable, and both parents proper custodians, but that there is a slight balance in favor of one or the other and a change should therefore be made. Such a policy would be not only legally unsound, but practically detrimental to the welfare of the child.' "[23]

On appeal, the decree of the trial court was affirmed except that the three month period during which the daughter would visit the mother, as contained in the original decree, was reinstated.[24]

The factual similarity between the *Andrews* and *Semmes* cases and the case before this Court is striking. In all three cases the wife was the guilty party; in all three cases the wife *agreed* to a grant of primary custody to the husband; and, finally, in the *Andrews*, *Semmes*, and this case there was no evidence of a material change in circumstances following the entry of the first custody decree. In the *Andrews* and *Semmes* cases the Supreme Court of Appeals of Virginia refused to modify the original decree granting custody to the husband. Therefore, the same result would be reached if this case were before a Virginia court.

The South Carolina court was required by the Full Faith and Credit Clause and its implementing statute to apply this Virginia rule for modification to the prior Virginia order.[25] It must give to the Virginia "judicial proceedings . . . the same full faith and credit . . . as they have by law or usage in the courts" of Virginia.

23. As quoted by the Supreme Court of Appeals of Virginia, 201 Va. at 122, 109 S.E. 2d at 548. (Emphasis added.)

24. 201 Va. at 125, 109 S.E. 2d at 550.

25. See Sutera v. Sutera, 1 A.D. 2d 356, 359, 150 N.Y.S. 2d 448, 452 (1956) where the court said:

> "The Special Term was not precluded by the full faith and credit clause of the Federal Constitution from modifying the custodial provisions of the Massachusetts decree if circumstances were established which might have been considered sufficient *in that State* to authorize a similar result." (Emphasis added.)

The fact is that the Supreme Court of South Carolina did not apply the *Virginia* rule for modification, but reached the same result upon application of the *South Carolina* rule. It said:

> "We have held that the Court may at any time on the application of any interested party, or even on its own motion, upon sufficient showing, make further disposition of the custody of a child, *if new facts and circumstances make it necessary or desirable for the child's welfare*. A judicial award of the custody of a child is never final. Ex Parte Atkinson, 238 S.C. 521, 121 S.E. (2d) 4."[26]

D.

THE OPINION OF THE SOUTH CAROLINA COURT DOES NOT RAISE A SUBSTANTIAL FEDERAL QUESTION

While Respondent respectfully submits that the foregoing arguments fairly represent the proper application of the Full Faith and Credit Clause to the custody status of children established by a Virginia "dismissed agreed" order, this issue is not ripe for decision in this case.

Petitioner assumes throughout her brief that the South Carolina court confined its inquiry and rendered its decision solely upon the basis of the "dismissed agreed" order of the Law and Equity Court of the City of Richmond, Virginia. She creates the impression that the South Carolina court found itself so inexorably bound by the order of the Virginia court that it was helpless to consider the issues presented in this case. But there is no foundation for such impression. In her vain quest for a constitutional issue, Petitioner has impressed a tortured construction upon the opinion of the

26. R. 206, 239 S.C. at , 123 S.E. 2d at 39. (Emphasis added.) See also Busbee v. Reese, 125 S.C. 121, 118 S.E. 185 (1923); Hartley v. Blease, 99 S.C. 92, 8 S.E. 991 (1914).

South Carolina court, wholly ignoring the ultimate basis upon which that court decided this case.

Petitioner was denied primary custody of the children because the Supreme Court of South Carolina found "neither allegation nor proof of any changed circumstances authorizing a change of the custody of the minor children of the parties to this action" since the entry of the prior custody decree.[27] This is the ultimate and determinative finding upon which the Supreme Court of South Carolina based its decision. This finding was neither in response to a constitutional mandate nor in derogation of a constitutional guarantee — it flowed solely from the application of the governing law of the state of South Carolina.

The South Carolina court's consideration of the Virginia order—and the effect given it — constituted no more than an intermediate determination which was preliminary to the application of South Carolina law. It considered the Virginia order for the sole purpose of determining whether there had been a prior order relating to custody entered by a court of record. And finding such an order, the Supreme Court of South Carolina held that Petitioner could not obtain custody of the children *under South Carolina law* unless she showed "changed circumstances authorizing a change of the custody."

The Supreme Court of South Carolina found — and correctly so — that the order of dismissal entered by the Virginia court was "*res judicata* in that State" of the issues raised in the habeas corpus proceeding. It accordingly held that it was "*res judicata* and entitled to full faith and credit in this State," and that it must be extended "the same faith and credit in this State . . . as 'by law or usage' the Courts of Virginia would give to such order or judgment."[28] But a

27. R. 205, 239 S.C. at , 123 S.E. 2d at 39.
28. R. 205, 239 S.C. at , 123 S.E. 2d at 39.

further examination of the South Carolina opinion shows that, having determined the Virginia order to be a valid custody decree, the South Carolina court applied *South Carolina law* to determine the effect of that order upon the issues presented to it. The court said:

> "We should point out that we have held in a number of cases that changed circumstances may authorize the change of custody of minor children. We have held that the Court may at any time on the application of any interested party, or even on its own motion, upon sufficient showing, make further disposition of the custody of a child, if new facts and circumstances make it necessary or desirable for the child's welfare. A judicial award of the custody of a child is never final. Ex Parte Atkinson, 238 S.C. 521, 121 S.E. (2d) 4. *Applying this rule to the instant case* and after examining the pleadings and the entire record we find neither allegation nor proof of any changed circumstances authorizing a change of the custody of the minor children of the parties to this action.
>
> "Since we have reached the conclusion that the dismissed agreed order of the Law and Equity Court of the City of Richmond, Virginia, is a bar to this action between the same parties for the same cause, *in the absence of any allegation or proof of any changed circumstances requiring a change of the custody of the children here involved*, the agreement reached by the parties prior to the order of the Virginia Court is still of full force and effect."[29]

Thus, having determined the nature of the Virginia order, the Supreme Court of South Carolina gave it the same effect as it would give a similar order of its own. The South Carolina court, in firm and positive language, recognized that an award of custody of a child is *never final*. It further recognized and affirmed its *power and duty* as a matter of *local law* to alter a custody arrangement "if new facts and ci-

29. R. 206, 239 S.C. at , 123 S.E. 2d at 39. (Emphasis added

cumstances make it necessary or desirable for the child's welfare."[30]

In the light of these pronouncements, it is difficult to comprehend Petitioner's assertions that the South Carolina court considered itself precluded from discharging its own responsibility by the order of a sister state. The Supreme Court of South Carolina applied South Carolina law to the facts and issues presented to it. This is the law invoked by Petitioner, and she should not be able to escape its consequences by arguing a non-existent constitutional issue.

In any event, a corresponding result would be reached under the rule of comity,[31] probably would be reached under a proper application of South Carolina law to the facts of this case,[32] and was reached under a proper application of North Carolina law to such facts.[33]

30. *Ibid.*

31. See May v. Anderson, 345 U.S. 528 at 535-536 (1953) (Frankfurter, J., concurring).

32. See Powell v. Powell, 231 S.C. 283, 98 S.E. 2d 764 (1957). There "marital difficulty" arose as a result of the mother's adulterous activities, albeit in a South Carolina ball park. Because of this adultery, the Supreme Court of South Carolina awarded custody to the father and pronounced the rule to be followed in its jurisdiction

> "It is usual for the custody of children of divorced parents to be awarded to the parent who is innocent of the conduct which led to the divorce. . . . 'Preference should be given to the party not at fault, and the custody of the child is usually awarded to the party who prevails in a suit for divorce. . . . In some jurisdictions . . . a divorce on the ground of adultery is a conclusive adjudication of the guilty party's unfitness to have custody.' . . . *'Other considerations being equal, . . . it is usual to award custody of children to the innocent spouse.'*" *Id.* at 286, 98 S.E. 2d at 765. (Emphasis added.)

33. Appendix A, pp. 65-71.

CONCLUSION

The Supreme Court of South Carolina correctly held that the Virginia order was *res judicata* as to the issues in the habeas corpus proceeding under Virginia law, and by applying South Carolina law to determine whether custody should be changed, it correctly adhered to its decisions.

There is no federal question of substance in this case, and the writ of certiorari should be dismissed as having been improvidently granted. In any event, if this Court concludes that there is present the "difficult and important" constitutional question, this question was properly decided by the Supreme Court of South Carolina, and the decision of that court should be affirmed.

WESLEY M. WALKER
Leatherwood, Walker, Todd & Mann
P. O. Box 1589
Greenville, South Carolina

JOHN S. DAVENPORT, III
ANGUS H. MACAULAY, JR.
Denny, Valentine & Davenport
1300 Travelers Building
Richmond 19, Virginia

Attorneys for Respondent

APPENDIX A

IN THE SUPERIOR COURT

NORTH CAROLINA
LEE COUNTY

H. AUBREY FORD, JR.,
Plaintiff;

SUMMONS

VS.

BARBARA DALE FORD,
Defendant.

THE STATE OF NORTH CAROLINA

To the Sheriff of the County of Lee and State of North Carolina, and the Sheriff of the County of Greenville, State of South Carolina—GREETING:

You are commanded to summon BARBARA DALE FORD, the defendant, above named, if she be found within your County, to appear before the Clerk of the Superior Court for the County of Lee, at his office in Sanford, within thirty days after the day of service hereof and answer the complaint, a copy of which is served herewith. And let her take notice, that if she fail to answer said complaint within the time above specified, the plaintiff will apply to the Court for the relief demanded in the complaint.

Herein fail not and of this summons make due return.

Given under my hand and seal of said Court, this 19 day of December, 1960.

s/ E. M. UNDERWOOD
Clerk of Superior Court

Received in the office of the Sheriff of Lee County, this 19th day of December, 1960.

Returned: *After due diligence, personal service cannot be had on Barbara Dale Ford in Lee County and State of*

North Carolina. Information secured states Barbara Dale Ford is now residing in County of Greenville, State of South Carolina.

This 19th day of December, 1960.

D. F. HOLDER, Sheriff of Lee County
By /s/ D. F. HOLDER D.S.

IN THE SUPERIOR COURT

NORTH CAROLINA
LEE COUNTY

H. AUBREY FORD, JR.,
Plaintiff;

vs.

BARBARA DALE FORD,
Defendant.

AFFIDAVIT OF SERVICE OF SUMMONS

I, Toy C. Jones, Deputy Sheriff of the County of Greenville, being duly sworn, do certify that on the 21st day of December, 1960, I served the attached process by delivering a copy thereof to Barbara Dale Ford, the party to be served therein named, together with a copy of complaint for absolute divorce on the grounds of adultery, and an order determining the custody of the minor children of the marriage of plaintiff and defendant, who are residents of the State of North Carolina, affidavit for service of process outside of the State, and order for service of process outside the State.

/s G. R. MARTIN
Sheriff of the County of Greenville
By /s/ TOY C. JONES,
Deputy Sheriff

IN THE SUPERIOR COURT

NORTH CAROLINA
LEE COUNTY

H. AUBREY FORD, JR.,

Plaintiff; CLERK'S CERTIFICATE

VS.

BARBARA DALE FORD,

Defendant.

STATE OF SOUTH CAROLINA, COUNTY OF GREENVILLE

I, Margaret W. Ross, Clerk of the C.C.P. & G.S. Court of the County of Greenville, State of South Carolina, do hereby certify that said Court is a Court of record, having the seal hereto attached; that Toy C. Jones is well known to me as a Deputy Sheriff of the County of Greenville, State of South Carolina, and that he has full power and authority to serve any and all legal process issuing from the Courts of this State; that said Toy C. Jones personally appeared before me this date and made and subscribed the attached affidavit relative to the service of process on Barbara Dale Ford, the party to be served therein.

This 21st day of December, 1960.

s/ MARGARET W. ROSS
Clerk of C.C.P. & G.S. Court
State of South Carolina, County of Greenville

IN THE SUPERIOR COURT

STATE OF NORTH CAROLINA
LEE COUNTY

H. AUBREY FORD, JR.,
Plaintiff;

VS.

BARBARA DALE FORD,
Defendant.

ORDER FOR SERVICE OF PROCESS OUTSIDE THE STATE

An affidavit and a verified pleading, satisfying the requirements of G. S. 1-98.4, having been duly filed herein, and it appearing to the satisfaction of the undersigned that Barbara Dale Ford cannot, after due diligence, be found in the State, it is now, therefore,

ORDERED

That service of process in the above-entitled action upon Barbara Dale Ford be made by service of process outside the State as provided by G. S. 1-104.

This 19 day of December, 1960.

s/E. M. UNDERWOOD
Clerk of Superior Court

IN THE SUPERIOR COURT

NORTH CAROLINA
LEE COUNTY

H. AUBREY FORD, JR.,
Plaintiff;

VS.

BARBARA DALE FORD,
Defendant.

AFFIDAVIT

Being duly sworn, H. Aubrey Ford, Jr., says:

That he is the party plaintiff in a civil action, captioned as above, pending in Lee Superior Court, for divorce on the grounds of adultery committed by his wife, who is the party

defendant and a necessary party to said action, who is the party to be served, and in said action he prays an award of the custody of three minor children who are residents of the State of North Carolina and are the children of the plaintiff and defendant; that such action is one specified by G. S. 1-98.2 and is of such a kind that the Court will have jurisdiction upon service of process by publication or outside of the State; that after due diligence, personal service cannot be had within the State. The name and residence of the defendant, after diligent search and inquiry, is: Barbara Dale Ford, 6-B McDaniel Heights Apartments, Greenville, South Carolina; and said defendant is of full age and competent, according to affiant's information.

s H. AUBREY FORD, JR.

Sworn to and subscribed before me this 19 day of December, 1960.

/s/ E. M. UNDERWOOD
Clerk of Superior Court

IN THE SUPERIOR COURT

NORTH CAROLINA
LEE COUNTY

H. AUBREY FORD, JR.,
Plaintiff:

COMPLAINT

VS.

BARBARA DALE FORD,
Defendant.

The plaintiff, complaining of the defendant, alleges:

I

That the plaintiff is a citizen and resident of Lee County in the State of North Carolina, and has been such for more than two years next preceding the commencement of this action;

II

That the defendant Barbara Dale Ford, is currently residing in the County of Greenville, State of South Carolina, and her address is: 6-B McDaniel Heights Apartments, Greenville, South Carolina.

III

That plaintiff and defendant were lawfully married in the City of Richmond, in the State of Virginia, on the 15th day of March, 1952; that there were born of said marriage three children, H. Aubrey Ford, III, age 7 years, Barbara Gray Ford, age 5 years, and James Lowry Ford, age 3 years, now residing with and in custody of plaintiff; that plaintiff and defendant lived together as husband and wife until the 25th day of August, 1959, when plaintiff and defendant separated from each other and have not thereafter lived together as husband and wife.

IV

That on or about the 5th and 6th days of July, 1959, and thereafter, on the 10th and 11th of July, 1959, the defendant was sexually intimate with James T. Sloan, in or near Gloucester, Virginia; that thereafter, on the 25th of July, 1959, the defendant was sexually intimate with James T. Sloan, in or near the City of Richmond, Virginia, and that thereafter, on the 17th day of August, 1959, the defendant was sexually intimate with James T. Sloan, in or near Bowling Green, Virginia, and the defendant has committed adultery with said Sloan on the aforesaid occasions and on other occasions unknown to the plaintiff, prior to and after said dates, and the facts alleged in this paragraph have existed to the knowledge of the plaintiff, for at least six months preceding the filing of this complaint.

V

That the plaintiff is a man of good character and reputation and is a fit and proper person to have the care, custody,

tuition and control of his minor children, H. Aubrey Ford, III, age 7 years, Barbara Gray Ford, age 5 years, and James Lowry Ford, age 3 years, now residing with and in the custody of the plaintiff, in Sanford, North Carolina, and the defendant is not a fit and proper person to have the care, custody, tuition and control of said minor children, and this is an action where an order of custody respecting North Carolina residents should be made.

WHEREFORE the plaintiff prays:

(1) That the bonds of matrimony heretofore existing between the plaintiff and defendant be dissolved absolutely and forever, and the plaintiff be granted an absolute divorce from the defendant;

(2) That an order be entered awarding the plaintiff the care, custody, tuition and control of his minor children, H. Aubrey Ford, III, age 7 years, Barbara Gray Ford, age 5 years, and James Lowry Ford, age 3 years; and

(3) The plaintiff have such other and further relief as he may be entitled in law or in equity.

s/ CLAWSON L. WILLIAMS, JR.
s/ KENNETH R. HOYLE
For: Hoyle & Hoyle
Attorneys for the Plaintiff

NORTH CAROLINA
LEE COUNTY

H. AUBREY FORD, JR., first being duly sworn, says:

That he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated upon information and belief, and as to those matters he believes it to be true; and that the plaintiff has been a resident of the State of

North Carolina for more than six (6) months next preceding the institution of this action.

/s/H. AUBREY FORD, JR.

Sworn to and subscribed before me this 19th day of December, 1960.

/s/RUTH THOMAS
Notary Public of Harnett County

My commission expires: September 26, 1961.

IN THE SUPERIOR COURT

NORTH CAROLINA
LEE COUNTY

H. AUBREY FORD, JR.,
Plaintiff

vs.

BARBARA DALE FORD,
Defendant

SPECIAL APPEARANCE AND MOTION TO DISMISS

NOW COMES Barbara Dale Ford, the defendant herein, and enters a special appearance for the purpose of making this motion and upon such appearance moves the Court to dismiss this action insofar as it relates to custody of the children of the marriage of the plaintiff and the defendant for lack of jurisdiction over the subject matter.

And as grounds for this motion this defendant respectfully shows unto the Court:

1. The children of the marriage of the plaintiff and the defendant do not reside nor are they within the State of North Carolina.

2. Jurisdiction over the custody of the subject children has heretofore been properly assumed and adjudged by the Juvenile and Domestic Relations Court of the County of Greenville, State of South Carolina, in which county and

state the subject children were then and are now present, and to which jurisdiction and judgment the plaintiff herein voluntarily submitted.

This 20th day of January, 1961.

McDERMOTT, CAMERON & HARRINGTON
By s/GEORGE M. McDERMOTT
GEORGE M. McDERMOTT, Attorneys making Special Appearance for the Defendant

Filed in the office of the Clerk of Superior Court of Lee County this 20th day of January, 1961, with copies for Plaintiff's Attorneys of record.

s E. M. UNDERWOOD
E. M. UNDERWOOD, Clerk Superior Court

IN THE SUPERIOR COURT

NORTH CAROLINA
LEE COUNTY
H. AUBREY FORD, JR.,
Plaintiff

ORDER

VS.

BARBARA DALE FORD,
Defendant

THIS CAUSE coming on to be heard at the February Term of the Superior Court of Lee County before his Honor Henry A. McKinnon, Jr., Judge Presiding, and being duly heard upon the motion of the defendant to dismiss this action in so far as it relates to the custody of the children of the marriage of the plaintiff and defendant, and the Court having fully heard the matter and the argument of Counsel for plaintiff and defendant; it appearing from argument and stipulation of Counsel from which the Court finds the following facts:

1. That the subject action was instituted in the Superior Court of Lee County, North Carolina, on December 19, 1960, and that thereafter on December 21, 1960, service was duly obtained upon the defendant in Greenville, South Carolina, pursuant to an Order for Service of Process outside the State of North Carolina.

2. That on January 20, 1961, through Counsel, defendant filed a Motion in this Court for the dismissal of the subject action in so far as it related to the custody of the children of the marriage of the plaintiff and the defendant on the grounds that they do not reside nor are they within the State of North Carolina, and for the further reason that jurisdiction over the custody of the subject children had theretofore been properly assumed and adjudged by the Juvenile and Domestic Relations Court of the County of Greenville, State of South Carolina, in which County and State the subject children were present and to which jurisdiction and judgment the plaintiff herein voluntarily submitted.

3. That the subject children, H. Aubrey Ford, III, Barbara Gray Ford, and James Lowry Ford are presently in the State of South Carolina in the custody of the defendant, having been returned to her by the plaintiff subsequent to the institution of this action.

It appearing to the Court from the foregoing that it has jurisdiction of the parties in the subject matter; that the matters raised by the Motion are properly a matter for determination on the trial of the subject action; it is therefore,

ORDERED AND ADJUDGED that the Motion of the defendant to dismiss this action in so far as it relates to the custody of the children of the marriage of the plaintiff and defendant be and the same is hereby overruled and denied and it is further ordered that the defendant shall be allowed thirty (30) days from the date of this Order within which

to file answer in this cause.

This 9th day of February, 1961.

/s/ HENRY A. McKINNON, JR.
HENRY A. McKINNON, JR.
Judge Presiding

IN THE SUPERIOR COURT

NORTH CAROLINA
LEE COUNTY

H. AUBREY FORD, JR.,
Plaintiff.

VS.

BARBARA DALE FORD,
Defendant.

ANSWER

The defendant, answering the complaint of the plaintiff, says:

I.

Paragraph I and Paragraph III of the complaint are admitted.

II.

It is admitted that the defendant is a resident of the County of Greenville, State of South Carolina, her current address being No. 8-C Terrace Apartments, Greenville, South Carolina.

III.

Paragraph V of the complaint is denied.

IV.

That all allegations of the complaint not hereinabove admitted, explained, or modified are denied by operation of law and pursuant to the Statute Laws of the State of North Carolina.

FOR A FURTHER ANSWER AND DEFENSE, THE DEFENDANT SAYS:

I.

Custody of the minor children of the subject marriage, H. Aubrey Ford, III, Barbara Gray Ford, and James Lowry Ford, has heretofore been awarded to the defendant by the Juvenile and Domestic Relations Court of the County of Greenville, State of South Carolina, in which County and State the subject children were then and are now present; that plaintiff was duly served with process issued by said Court, was represented by Counsel and personally appeared and testified in the Hearing conducted by the said Court; that the matters relating to the custody of the subject children and the fitness of the plaintiff and defendant alleged in the complaint have heretofore been considered and ruled upon by the said Court of the State of South Carolina. Said Order of the Domestic Relations Court has been reviewed on appeal by the Court of Common Pleas for Greenville County, of South Carolina, and such Order was affirmed and custody awarded to the defendant for the nine school months and to the plaintiff for Christmas and summer vacation months.

II.

That the subject children do not reside in nor are they physically present in the State of North Carolina.

WHEREFORE, the defendant having fully answered the complaint of the plaintiff, prays that plaintiff's prayer for relief as set forth in the complaint be denied.

McDERMOTT, CAMERON & HARRINGTON
By /s/GEORGE M. McDERMOTT
Attorneys for Defendant

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

BARBARA DALE FORD, first being duly sworn, says:

That she has read the foregoing Answer and knows the contents thereof; that the same is true of her own knowledge, except as to the matters therein stated upon information and belief, and as to those matters she believes it to be true.

s/ BARBARA D. FORD

Sworn to and subscribed before me this 10th day of March, 1961.

signature illegible.
Notary Public for the State of South Carolina

IN THE SUPERIOR COURT

NORTH CAROLINA
LEE COUNTY

H. AUBREY FORD, JR.,
Plaintiff;

vs.

BARBARA DALE FORD,
Defendant.

MOTION TO STRIKE AND REPLY

Now comes, H. Aubrey Ford, Jr., the plaintiff herein and moves to strike from the answer filed in this action all of Paragraph 4 therein because same is irrelevant, immaterial and improper, for that same is not a general or specific denial of each material allegation of the complaint as required by law and constitutes a sham or irrelevant answer, in that said answer has no substantial relation to the controversy and presents no defense to the action and states no facts but only conclusions of law, and therefore puts no fact in issue and that the plaintiff would be prejudiced and damaged if said allegations are allowed to stand as now appear in

said answer. And notice is hereby given that upon trial of the cause the plaintiff will move the Court to hear said motion to strike.

THE PLAINTIFF REPLYING TO THE FURTHER ANSWER AND DEFENSE OF THE DEFENDANT FILED IN THIS CAUSE, SAYS AND ALLEGES:

1. That the allegations of Paragraph I of the defendant's further answer and defense are untrue and are denied, it being specifically denied that the Court of Common Pleas for the County of Greenville, South Carolina, affirmed the order of the Juvenile and Domestic Relations Court of the County of Greenville, South Carolina, all of which matters are on appeal and subject to review. That plaintiff and defendant entered into an agreement duly and legally made between themselves by and with legal counsel and related to an action between this plaintiff and this defendant in the Law and Equity Court of the City of Richmond, Virginia. That pursuant to said agreement the custody of the three children was agreed upon in writing by correspondence between respective legal counsel of the parties. According to said agreement the defendant was to have custody of the children for the summer period beginning two weeks from the date the last child completes the school year and ending two days before the first child is to return to School in September and except as otherwise specifically provided, it was expressly agreed that the plaintiff would have custody for the remainder of the year. As a part of his reply the plaintiff incorporates by reference the copies of the correspondence between legal counsel for the plaintiff and legal counsel for the defendant whereby an agreement was duly made between the parties with the knowledge and permission of said Law and Equity Court of the City of Richmond, Virginia, and subsequent to which agreement the said action was dismissed. The plaintiff alleges that he is entitled

to the custody of the minor children according to the terms and provisions of said agreement between the parties. As a part of his reply, the plaintiff incorporates by reference copies of all of the proceedings in said Court, including the order of dismissal on the 18th day of November, 1959. Further, the defendant has violated and breached the agreement made between the parties by and with their respective legal counsel and violated the order of the Court of record in Richmond, Virginia, that was duly issued and based upon said agreement by instituting a proceeding without cause in the State of South Carolina, and that for all purposes the proceeding in the Law and Equity Court of the City of Richmond, Virginia, and the agreements and the order based thereon were res judicata between the parties.

2. The allegations of Paragraph 2 of the defendant's further answer and defense are untrue and are denied, it being alleged that said children are citizens of the State of North Carolina and were physically present in the said State when this action was instituted and while the children of this marriage may be temporarily absent from this State from time to time, that such absences are pursuant to the agreement duly and legally made between the plaintiff and defendant by and with legal counsel and related to an action between this plaintiff and this defendant in the Law and Equity Court of the City of Richmond, Virginia; asset forth in the preceding paragraph.

WHEREFORE, the plaintiff having replied to the further answer and defense of the defendant, renews his prayer for relief as set forth in his complaint.

/s/KENNETH R. HOYLE
For: Hoyle & Hoyle, Attorneys for Plaintiff

NORTH CAROLINA
LEE COUNTY

H. AUBREY FORD, JR., first having been duly sworn, deposes and says:

That he is the plaintiff in the foregoing action; that he has read the foregoing reply and knows the contents thereof; that the same is true of his own knowledge, except as to matters stated on information and belief, and as to those he believes it to be true.

/s/H. AUBREY FORD, JR.

Sworn to and subscribed before me this 18 day of March, 1961.

/s/RUTH THOMAS
Notary Public of Harnett County

My commission expires: Sept. 26, 1961.

Law Offices
Denny, Valentine & Davenport
Travelers Building
Richmond, Virginia
October 26, 1959

Mr. Alexander W. Parker
Attorney at Law
Mutual Building
Richmond, Virginia

Dear Alex:

Re: *H. Aubrey Ford, Jr. v. Barbara D. Ford*

This letter concerns the subject of the conference held this morning in my office at which Aubrey and Barbara were present with you and me.

As a proposal for settlement of the question of custody of the three Ford children, Aubrey has authorized me to convey the following:

1. Barbara is to have the children for the summer period beginning two weeks from the date the last child completes the school year in June and ending two days before the first child is to return to school in September. Except as set forth below Aubrey is to have custody for the remainder of the year.

2. During the time that Aubrey is on the Kentucky-Tennessee tobacco market between the latter part of November and the middle of December and in Europe in the spring, to the extent it does not interfere with school the children are to visit Barbara or Barbara to visit them in Sanford, whichever Aubrey and Barbara may agree to at the time. Aubrey tells me that there may be times when he will not be required to stay on the Kentucky-Tennessee market for more than two or three days at a time. I think it should be understood that in those cases this provision is not applicable.

3. With reference to the Christmas vacation period Aubrey will agree that one of them shall have the children from the beginning of vacation until December 27 and the other for the balance of the vacation. These periods are to be reversed from year to year so that one parent will have the first part of vacation in one year and the latter part of vacation in the following year. He will further agree that an effort be made in each year to the extent possible under the circumstances that the family be in the same locality for the whole period.

4. It is understood that when the children are with Barbara they are not to be in Richmond or Gloucester.

5. Aubrey will, of course, provide for the children. When the children are with Barbara he will make a reasonable allowance to her for their maintenance and support but it is to be understood that she is not to incur any expenses or bills without Aubrey's prior approval.

6. It is, of course, understood that when the children are with either parent the other is to have the right to visit at reasonable times.

It is planned that little Aubrey will remain with Barbara until Christmas vacation so as not to interrupt his school in the meantime. After Barbara has established herself wherever it may be, Aubrey will consider letting Jay be with Barbara most of the time until he is ready for school.

If Barbara agrees to the above terms, it is desirable that this settlement be effective immediately so that Aubrey and the two youngest children can go to Sanford with his mother as soon as possible. After you have had a chance to review this and discuss it with Barbara, I will appreciate a prompt reply.

Sincerely yours,

JOHN S. DAVENPORT, III

JSD:mah

Christian, Barton, Parker & Boyd
Mutual Building
Richmond 19, Virginia
October 27, 1959

John S. Davenport, III, Esq.
Travelers Building
Richmond 19, Virginia

In re: *H. Aubrey Ford, Jr. v. Barbara D. Ford*

Dear John:

I have your letter of October 26th and have thoroughly discussed it and our conference with Barbara.

Generally speaking we are in accord with all of the contents of your letter.

We do have a couple of suggestions:

1. In paragraph 1 we would like to delete the words "in June" appearing on the third line.

2. We would like for paragraph 4 to read as follows:

"It is understood that when the children are with Barbara they are not to be in Gloucester. Also that when the children are with Barbara they are not to live in Richmond, but Barbara shall be privileged to bring the children to visit in Richmond provided that such visits shall not aggregate in time more than two weeks out of each year."

As I understand from you on telephone these changes will be agreeable to you and Aubrey. If that be true, then please let me know and we will consider this a matter accomplished.

I assume, pursuant to the agreement that you and I had, that the suit in the Law and Equity Court will be dismissed promptly.

Very sincerely yours,

/s/ Alexander W. Parker

awp: hw

Law Offices
Denny, Valentine & Davenport
Travelers Bldg.
Richmond, Virginia
October 27, 1959

Mr. Alexander W. Parker
Christian, Barton, Parker & Boyd
Mutual Building
Richmond, Virginia

Dear Alex:

Re: *H. Aubrey Ford, Jr. v. Barbara D. Ford*

I acknowledge your letter of this date in reply to mine of October 26.

The two suggested changes which you set forth are agreeable to Aubrey and consequently, we may consider this as an accomplished matter.

I will submit to you in the next few days an order dismissing the case in the Law and Equity Court.

Sincerely yours,

JOHN S. DAVENPORT, III

JSD:mah
bc. Mr. H. Aubrey Ford, Jr.

VIRGINIA:

IN THE LAW AND EQUITY COURT OF THE CITY OF RICHMOND

H. AUBREY FORD, JR.,
Petitioner,

v.

BARBARA DALE FORD,
Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

To the Honorable Judges of the Law & Equity Court of the City of Richmond

Your petitioner, H. Aubrey Ford, Jr., exhibits this his petition against Barbara Dale Ford, his wife, and respectfully represents as follows:

1. That he is the father and she is the mother of three children, namely, H. Aubrey Ford, III, six (6) years of age; Barbara Gray Ford, four (4) years of age; and James Lowry Ford, two (2) years of age. Petitioner is a resident of the State of North Carolina and resides in Carbonton Heights in the City of Sanford in said State. He is employed by Tobacco Merchants Corporation of New York City and the Sanford Tobacco Company, Sanford, North Carolina.

2. Respondent has recently been guilty of acts which were not only of a nature that would justify petitioner seeking a divorce from her but which render her unfit to have the cus-

tody of said children. Knowledge of those acts first came to petitioner on August 15 when he was at home in Sanford, North Carolina, with the children above mentioned and his wife, the respondent, was visiting members of her family in Gloucester and in Richmond, Virginia. On the return of his wife to Sanford, North Carolina, in the middle of the following week conversations were had between petitioner and respondent concerning their future and the future of the children and in order that respondent might seek the advice of her mother and other members of her family, petitioner drove respondent to Richmond on Tuesday, August 25, leaving respondent at the home of respondent's mother in Richmond. Petitioner spent the night in Richmond at the home of his mother, having made arrangements for the children and their nurse to spend the night with friends of petitioner in Sanford, North Carolina.

3. Fearful lest respondent might clandestinely return to North Carolina, seize the children and take them, petitioner arranged on Wednesday, August 26, to have the children taken from Sanford a distance of some 35 to 40 miles to Fayetteville, North Carolina, with their nurse. Petitioner together with his mother met the children and the nurse in Fayetteville on the night of Wednesday, August 26, they having been driven to Fayetteville by petitioner's chauffeur.

4. Petitioner, his mother, the three children and the nurse spent the night of August 26 at a motel in Fayetteville. The following morning petitioner left for his office in Sanford, leaving the children with his mother and their nurse. He had scarcely left the motel when respondent and her sister appeared in an automobile, took the children over the protest of the nurse and petitioner's mother and left.

5. Petitioner believes that respondent with the children are now at the home of respondent's mother, Mrs. R. Finley Gayle, Jr., 311 Charmain Road, Richmond, Virginia.

6. Petitioner alleges the positions as aforesaid which he occupies are permanent positions at ample salary and sufficient to enable him to properly provide for the education, maintenance and support of his children; that he is able to provide a comfortable home for his children and has been doing so where they reside in Sanford, North Carolina, and that his mother, who is a widow, is ready and willing to make her home with petitioner to help him oversee and care for the children.

7. Petitioner alleges that respondent is not a fit and proper person to have the custody of the said minor children and that petitioner is a fit and proper person to have such custody and that the best interests of said children would be promoted by them being forthwith returned to the care, custody and control of petitioner.

WHEREFORE, petitioner prays that a writ of *habeas corpus ad subjiciendum* may issue directed to the said Barbara Dale Ford requiring her to produce the bodies of H. Aubrey Ford, III, Barbara Gray Ford and James Lowry Ford, before the court at a time and place therein specified and to do and receive what shall then and there be considered by the court concerning said children, together with the cause of said detention, and that the petitioner have the care, custody and possession of said children.

/s/H. Aubrey Ford, Jr.
Petitioner

STATE OF VIRGINIA
CITY OF RICHMOND, to-wit:

This day H. Aubrey Ford, Jr., the petitioner in the foregoing petition, personally appeared before me, Mae Anderson Hobbs, a notary public in and for the City aforesaid in the State of Virginia, and made oath that the matters and

things stated in the aforegoing petition are true; except in so far as they are alleged on information and belief and as to matters alleged on information and belief he believes them to be true.

Given under my hand this 28th day of August, 1959.
My commission expires March 28, 1961.

s/ Mae Anderson Hobbs
Notary Public
Commissioned Mae Anderson

Denny, Valentine & Davenport
1300 Travelers Building
Richmond, Virginia
Counsel for Petitioner

VIRGINIA:

IN THE LAW AND EQUITY COURT OF THE CITY OF RICHMOND

H. Aubrey Ford, Jr.,
Petitioner,

ORDER AWARDING WRIT OF HABEAS CORPUS

Barbara Dale Ford,
Respondent.

This day came H. Aubrey Ford, Jr. by his attorney and presented to the Court his verified petition praying for a writ of *habeas corpus ad subjiciendum*, and it appearing therefrom that there is probable cause to believe that the infant children mentioned in said petition to-wit: H. Aubrey Ford, III, Barbara Gray Ford, James Lowry Ford, are illegally detained and the custody of said infant children illegally held by respondent, Barbara Dale Ford, in the City of Richmond, Virginia, it is ordered that a writ of *habeas corpus ad subjiciendum* be, and the same is hereby ordered to be, issued

out of the Clerk's office of this Court, directed the said Barbara Dale Ford, commanding her to have and produce the bodies of the said infants as aforesaid, before the Court on the 2nd day of September, 1959, at 10:30 A.M. in the forenoon on that day, to do and receive what is then and there been considered concerning the said infants and that she have then and there said writ of habeas corpus ad subjiciendum.

It is ordered that an attested copy of this order shall serve as the writ above mentioned.

Judge

REVERSE SIDE

Executed in the City of Richmond, Virginia, this 28th day of August, 1959, by delivering a true copy of the within Order in writing to Barbara Dale Ford in person.

JAMES H. YOUNG
Sheriff, City of Richmond, Va.
By /s/E. L. McGREGOR
Deputy Sheriff

VIRGINIA:

IN THE LAW AND EQUITY COURT OF THE CITY OF RICHMOND

H. AUBREY FORD, JR.,
Petitioner,

v.

BARBARA DALE FORD,
Respondent.

RETURN ON WRIT OF HABEAS CORPUS

Respondent, Barbara Dale Ford, for answer to the petition of H. Aubrey Ford, Jr., and the writ of habeas corpus *ad subjiciendum* which was issued from the Clerk's Office of the Law and Equity Court of the City of Richmond on the 28th day of August, 1959, says that she now here produces the bodies of the said H. Aubrey Ford, III, Barbara Gray Ford and James Lowry Ford, the infant children named in

the said petition for the writ, but by agreement of counsel the physical presence of said infant children not being required, and for further return and answer to the said writ alleges and avers:

1. That the respondent is and always has been a fit and proper person to have custody of the said infant children.

2. That the said writ was issued improvidently and without probable cause.

And now having fully answered, respondent prays that the said writ may be discharged and that she may be awarded her costs upon her return to the writ aforesaid in this behalf expended.

/s/ BARBARA DALE FORD
BARBARA DALE FORD

STATE OF VIRGINIA
CITY OF RICHMOND, to-wit:

This day Barbara Dale Ford, the respondent in the foregoing return, personally appeared before me, Hazel M. Walters, a Notary Public in and for the City aforesaid, in the State of Virginia, and made oath that the matters and things stated in the foregoing return are true except in so far as they are alleged to be on information and belief and as to matters alleged on information and belief she believes them to be true.

Given under my hand this 2nd day of September, 1959.

My commission expires the 28th day of November, 1961.

/s/HAZEL M. WALTERS
Notary Public

Christian, Barton, Parker & Boyd
500-506 Mutual Building
Richmond, Virginia—Counsel
/s/ALEX W. PARKER
Of Counsel

CERTIFICATE

I certify that on the 2nd day of September, 1959, a copy of the within return was delivered to John S. Davenport, III, Esq., Denny, Valentine and Davenport, 1300 Travelers Building, Richmond, Virginia, counsel of record for petitioner.

/s ALEX W. PARKER

VIRGINIA:

IN THE LAW AND EQUITY COURT OF THE CITY OF RICHMOND

H. AUBREY FORD, JR.,
Petitioner

v.

BARBARA DALE FORD,
Respondent

MOTION TO QUASH THE WRIT OF HABEAS CORPUS

Respondent, Barbara Dale Ford, moves the Honorable Court to quash the writ of habeas corpus *ad subjiciendum* which was issued from the Clerk's Office of the Law and Equity Court of the City of Richmond on August 28, 1959, for the reason that the petition for the issuance of said writ is insufficient in that it fails to show or allege probable cause that the infant children named therein, to-wit, H. Aubrey Ford, III, Barbara Gray Ford and James Lowry Ford, are detained without lawful authority.

/s/ BARBARA DALE FORD
BARBARA DALE FORD

Christian, Barton, Parker & Boyd
500-506 Mutual Building
Richmond, Virginia—Counsel
/s/ ALEX W. PARKER
Of Counsel

CERTIFICATE

I certify that on the 2nd day of September, 1959, a copy of the within motion was delivered to John S. Davenport, III, Esq., Denny, Valentine and Davenport, 1300 Travelers Building, Richmond, Virginia, counsel of record for petitioner.

s ALEX W. PARKER

VIRGINIA:

IN THE LAW AND EQUITY COURT OF THE CITY OF RICHMOND

H. AUBREY FORD, JR.,
Petitioner,

v. ORDER OF DISMISSAL

BARBARA DALE FORD,
Respondent.

It being represented to the Court by Counsel that the parties hereto have agreed concerning the custody of the infant children, it is ordered that this case be dismissed.

Enter:

J. H. R.

Nov. 18, 1959

Judge

November , 1959

A Copy

Teste: LUTHER LIBBY, JR., *Clerk*
By s/ EDWARD G. KIDD

We ask for this:

s/ JOHN S. DAVENPORT
Counsel for the Petitioner
s/ ALEXANDER W. PARKER
Counsel for the Respondent

IN THE SUPERIOR COURT

NORTH CAROLINA
LEE COUNTY

H. AUBREY FORD, JR.,
Plaintiff

MOTION

VS.

BARBARA DALE FORD,
Defendant

Now comes, Barbara Dale Ford, the defendant herein and moves the Court that the portions of Plaintiff's Reply as hereinafter set out be stricken for the reasons hereinafter stated:

I

All that portion of paragraph 1 of the Plaintiff's Reply which reads as follows:

"That plaintiff and defendant entered into an agreement duly and legally made between themselves by and with legal counsel and related to an action between this plaintiff and this defendant in the Law and Equity Court of the City of Richmond, Virginia. That pursuant to said agreement the custody of the three children was agreed upon in writing by correspondence between respective legal counsel of the parties. According to said agreement the defendant was to have custody of the children for the summer period beginning two weeks from the date the last child completes the school year and ending two days before the first child is to return to School in September and except as otherwise specifically provided, it was expressly agreed that the plaintiff would have custody for the remainder of the year. As a part of his reply the plaintiff incorporates by reference the copies of the correspondence between legal counsel for the plaintiff and legal counsel for the defendant whereby an

agreement was duly made between the parties with the knowledge and permission of said Law and Equity Court of the City of Richmond, Virginia, and subsequent to which agreement the said action was dismissed. The plaintiff alleges that he is entitled to the custody of the minor children according to the terms and provisions of said agreement between the parties. As a part of his reply, the plaintiff incorporates by reference copies of all of the proceedings in said Court, including the order of dismissal on the 19th day of November, 1959. Further, the defendant has violated and breached the agreement made between the parties by and with their respective legal counsel and violated the order of the Court of record in Richmond, Virginia, that was duly issued and based upon said agreement by instituting a proceeding without cause in the State of South Carolina, and that for all purposes the proceeding in the Law and Equity Court of the City of Richmond, Virginia, and the agreements and the order based thereon were res judicata between the parties" for that the same is argumentative, evidential and attempts to state a conclusion of the pleader.

II

All that portion of paragraph 2 of the Plaintiff's Reply which reads as follows:

"that such absences are pursuant to the agreement duly and legally made between the plaintiff and defendant by and with legal counsel and related to an action between this plaintiff and this defendant in the Law and Equity Court of the City of Richmond, Virginia, as set forth in the preceding paragraph" for that the same is argumentative, evidential and attempts to state a conclusion of the pleader.

WHEREFORE, the defendant moves the Court that the foregoing portions of the Plaintiff's Reply be stricken from the record for the reasons hereinabove stated and for the

further reason that evidence in support of said allegations would be improper and inadmissible on the trial of this action and that the defendant would be prejudiced and damaged if the said allegations are allowed to stand as now appear in the said Reply.

This 6th day of May, 1961.

McDERMOTT, CAMERON & HARRINGTON
By /s/GEORGE M. McDERMOTT
Attorneys for Defendant

IN THE SUPERIOR COURT

NORTH CAROLINA
LEE COUNTY

H. AUBREY FORD, JR.,
Plaintiff

ORDER

VS.

BARBARA DALE FORD,
Defendant

The above entitled action coming on to be heard at the May Term of the Superior Court of Lee County, before His Honor, George M. Fountain, Judge Presiding, on written Motions of the parties to strike certain portions of the Answer and Reply filed herein by the respective parties, and the Court having fully heard the matter and the argument of Counsel for plaintiff and defendant;

IT IS NOW, THEREFORE, ORDERED, ADJUDGED AND DECREED:

1. That paragraph IV of the defendant's Answer as filed herein be stricken and upon motion of the defendant in open

Court leave is hereby granted for the defendant to file an Amendment to the deleted portion of the said Answer on or before May 29, 1961, in accordance with said Motion.

2. That the following be stricken from paragraph 1 of plaintiff's Reply:

"That plaintiff and defendant entered into an agreement duly and legally made between themselves by and with legal counsel and related to an action between this plaintiff and this defendant in the Law and Equity Court of the City of Richmond, Virginia. That pursuant to said agreement the custody of the three children was agreed upon in writing by correspondence between respective legal counsel of the parties. According to said agreement the defendant was to have custody of the children for the summer period beginning two weeks from the date the last child completes the school year and ending two days before the first child is to return to School in September and except as otherwise specifically provided, it was expressly agreed that the plaintiff would have custody for the remainder of the year. As a part of his reply the plaintiff incorporates by reference the copies of the correspondence between legal counsel for the plaintiff and legal counsel for the defendant whereby an agreement was duly made between the parties with the knowledge and permission of said Law and Equity Court of the City of Richmond, Virginia, and subsequent to which agreement the said action was dismissed. The plaintiff alleges that he is entitled to the custody of the minor children according to the terms and provisions of said agreement between the parties. As a part of his reply, the plaintiff incorporates by reference copies of all of the proceedings in said Court, including the order of dismissal on the 18th day of November, 1959. Further, the defendant has violated and breached the agreement made between the parties by and with their respective legal counsel and violated the order of the Court of record in Richmond.

Virginia, that was duly issued and based upon said agreement by instituting a proceeding without cause in the State of South Carolina, and that for all purposes the proceeding in the Law and Equity Court of the City of Richmond, Virginia, and the agreements and the order based thereon were res judicata between the parties."

3. That the following be stricken from paragraph 2 of plaintiff's Reply:

"that such absences are pursuant to the agreement duly and legally made between the plaintiff and defendant by and with legal counsel and related to an action between this plaintiff and this defendant in the Law and Equity Court of the City of Richmond, Virginia, as set forth in the preceding paragraph."

This 10th day of May, 1961.

/s/GEORGE M. FOUNTAIN
GEORGE M. FOUNTAIN, Judge Presiding

IN THE SUPERIOR COURT

NORTH CAROLINA
LEE COUNTY
H. AUBREY FORD, JR.,
Plaintiff

AMENDMENT TO ANSWER

VS.

BARBARA DALE FORD,
Defendant

The defendant by leave of court first had and obtained, amends her Answer heretofore filed in this action, by striking out paragraph IV and inserting in lieu thereof the following:

IV

Paragraph IV of the Complaint is not answered.

And except as hereby amended, defendant adopts and ratifies her original Answer as fully as if herein set out.

McDERMOTT, CAMERON & HARRINGTON
By s/GEORGE M. McDERMOTT
Attorneys for Defendant

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

BARBARA DALE FORD, first being duly sworn, says: That she has read the foregoing Amendment to Answer and knows the contents thereof; that the same is true of her own knowledge, except as to the matters therein stated upon information and belief, and as to those matters she believes it to be true.

s/ BARBARA D. FORD

Sworn to and subscribed before me this 29 day of May, 1961.

s/O. G. CALHOUN
Notary Public for the State of South Carolina

My commission expires at the pleasure of the Governor

IN THE SUPERIOR COURT

NORTH CAROLINA
LEE COUNTY

H. AUBREY FORD, JR.,
Plaintiff,

vs. ORDER

BARBARA DALE FORD,
Defendant.

THIS CAUSE coming on to be heard at the May 1962 Term of Superior Court of Lee County, before His Honor Hal H. Walker, Judge Presiding, upon the motion of the

plaintiff for leave to file an amendment to his complaint, and the Court in the exercise of its discretion being of the opinion that such motion should be granted;

IT IS NOW ORDERED that the plaintiff be and he is hereby allowed to file said amendment as a part of the record of this action;

And the defendant is allowed 30 days from the date of this order within which to file answer or demurrer to said amendment.

This 14th day of May, 1962.

s/HAL H. WALKER
Judge Presiding

IN THE SUPERIOR COURT

NORTH CAROLINA
LEE COUNTY

H. AUBREY FORD, JR.,
Plaintiff;

vs.

BARBARA DAIE FORD,
Defendant.

AMENDMENT TO COMPLAINT

The plaintiff, by leave of the Court first had and obtained, amends his complaint heretofore filed in this cause, by adding the following numbered paragraphs and inserting after Paragraph 5, the following:

AND FOR A SECOND AND ADDITIONAL CAUSE OF ACTION, THE PLAINTIFF COMPLAINING OF THE DEFENDANT, ALLEGES AND SAYS:

I

That the plaintiff is a citizen and resident of Lee County in the State of North Carolina, and has been such for more

than two years next preceding the commencement of this action.

II

That the defendant Barbara Dale Ford, is currently residing in the County of Greenville, State of South Carolina;

III

That plaintiff and defendant were lawfully married in the City of Richmond, in the State of Virginia, on the 15th day of March, 1952; that there were born of said marriage three children, H. Aubrey Ford, III, Barbara Gray Ford, and James Lowry Ford; that plaintiff and defendant lived together as husband and wife until the 25th day of August, 1959, when plaintiff and defendant separated from each other and have not thereafter lived together as husband and wife.

IV

That since the 25th day of August, 1959, the plaintiff and defendant have lived continuously separate and apart from each other and at no time resumed their marital relationship which formerly existed between them.

And except as hereby amended, plaintiff adopts and ratifies his original complaint as fully as if herein set out.

DENNY, VALENTINE & DAVENPORT
CLAWSON L. WILLIAMS, JR.
HOYLE & HOYLE
By /s/KENNETH R. HOYLE
Attorneys for Plaintiff

NORTH CAROLINA
LEE COUNTY

H. AUBREY FORD, JR., being first duly sworn, says:

That he has read the foregoing amendment to complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated upon

information and belief, and as to those matters he believes it to be true.

/s/H. AUBREY FORD, JR.

Sworn to and subscribed before me this 10th day of May, 1962.

s/RUTH THOMAS
Notary Public of Harnett County

My commission expires: Sept. 26, 1963.

IN THE SUPERIOR COURT

NORTH CAROLINA
LEE COUNTY

H. AUBREY FORD, JR.,
Plaintiff,

vs.

BARBARA DALE FORD,
Defendant.

ANSWER TO AMENDMENT TO COMPLAINT

The defendant, answering the Second and Additional Cause of Action as set out in Plaintiff's Amendment to Complaint, alleges;

1.

That the allegations contained in paragraph I of said Second Cause of Action are admitted;

2.

That the allegations contained in paragraph II of said Second Cause of Action are admitted;

3.

That the allegations contained in Paragraph III of said Second Cause of Action are admitted;

4.

That the allegations contained in paragraph IV of said Second Cause of Action are admitted;

WHEREFORE, the defendant, having fully answered the Second and Additional Cause of Action as set out in Plaintiff's Amendment to Complaint, does not resist the granting of the divorce for the reasons set out in the Second and Additional Cause of Action; and except as herein specifically admitted defendant adopts and ratifies her original Answer as if fully set out herein.

McDERMOTT, CAMERON & HARRINGTON
By s/ GEORGE M. McDERMOTT
Attorneys for Defendant

7

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

BARBARA DALE FORD, being duly sworn, says that she has read the foregoing Answer to the Second and Additional Cause of Action as set out in Amendment to Complaint and knows the contents thereof; that the same is true of her own knowledge, except as to the matters therein stated upon information and belief, and as to those matters she believes it to be true.

s/ BARBARA D. FORD

Sworn to and subscribed before me this 31st day of May, 1962.

s/ ELLEN M. LACKABY
Notary Public for the State of South Carolina
My comm. expires at the pleasure of the Governor.

IN THE SUPERIOR COURT

NORTH CAROLINA
LEE COUNTY

H. AUBREY FORD, JR.,
Plaintiff

vs.

BARBARA DALE FORD,
Defendant

ORDER

THIS CAUSE coming on to be heard before the undersigned Judge in Chambers on motion of J. Allen Harrington, of counsel for defendant; that this action be ordered calendared and tried at the earliest possible date and it appearing to the Court and the Court finding as a fact that John S. Davenport, Jr., Attorney at Law, Richmond, Virginia, is of counsel for the plaintiff and that he is presently outside the continental United States and will return on or about May 28, 1962; and it further appearing from statement of counsel for the plaintiff that the plaintiff will move to amend his Complaint at the May 7, 1962 term of Lee County Superior Court to add a second cause of action for divorce based on the grounds of two years separation; and that this cause will be ready for trial at the August 6, 1962 term of Lee County Superior Court.

IT IS, THEREFORE, ORDERED that this matter be peremptorily set for trial as the first contested case in Lee County Superior Court for the term beginning August 6, 1962

s/C. W. HALL
Judge Holding Courts in the Eleventh Judicial District

IN THE SUPERIOR COURT

NORTH CAROLINA
LEE COUNTY

H. AUBREY FORD, JR.,
Plaintiff;

vs.

ISSUES

BARBARA DALE FORD,
Defendant.

1. Were the plaintiff and defendant married to each other as alleged in the complaint?

Answer: *Yes.*

2. Has the plaintiff been a resident of the State of North Carolina for more than six months next preceding the bringing of this action?

Answer: *Yes.*

3. Have the plaintiff and defendant lived separate and apart from each other continuously for a period of two years next preceding the assertion of this cause of action, as alleged in the amendment to the Complaint?

Answer: *Yes.*

Judgment #12,409 Recorded on Judgment Docket No. 16—Page 389 & 390.

IN THE SUPERIOR COURT

NORTH CAROLINA
LEE COUNTY

H. AUBREY FORD, JR.,
Plaintiff;

JUDGMENT

vs.

SD 6159 CID 3262

BARBARA DALE FORD,
Defendant.

THIS CAUSE coming on to be heard and being heard before His Honor, Edward B. Clark, Judge Presiding and a

Jury at the August term of the Superior Court of Lee County, and the following issues having been submitted to and answered by the Jury:

1. Were the plaintiff and defendant married to each other as alleged in the complaint?

Answer: "Yes."

2. Has the plaintiff been a resident of the State of North Carolina for more than six months next preceding the bringing of this action?

Answer: "Yes."

3. Have the plaintiff and the defendant lived separate and apart from each other continuously for a period of two years next preceding the assertion of this cause of action as alleged in the amendment to the complaint?

Answer: "Yes."

NOW THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff H. Aubrey Ford, Jr., be and he is hereby granted an absolute divorce from the defendant Barbara Dale Ford, and that the bonds of matrimony heretofore existing between the plaintiff and defendant be and they are hereby dissolved.

This matter coming on to be heard on the motion of the plaintiff for an award of custody of the three minor children, namely, H. Aubrey Ford, III, age 9, Barbara Gray Ford, age 7 and James Lowry Ford, age 5, and plaintiff appearing in person and by counsel and defendant appearing by counsel and the children being within the jurisdiction of the Court, and it appearing to the Court from the pleadings and the evidence, and the Court, after due inquiry and from the evidence and argument of counsel, finds as a fact:

That at the time of their separation the plaintiff, the defendant and the said children were domiciliaries and resi-

dents of Lee County, State of North Carolina; that upon separation the defendant removed the infant children to Richmond, Virginia; that neither party was a legal resident of said state; that the plaintiff instituted a habeas corpus proceeding in the Law and Equity Court of the City of Richmond, Virginia, seeking the custody of the children, and the children and the subject matter were subject to the jurisdiction of said Virginia Court; that pending hearing in said proceeding, plaintiff and defendant, both represented by counsel, reached an agreement concerning the custody of said children, the substance of which is:

(1) Defendant is to have the children for the summer period, beginning two weeks from the date the last child completes the school year, and ending two days before the first child is to return to school in September. Except as set forth below plaintiff is to have custody for the remainder of the year.

(2) During the time that plaintiff is on the Kentucky-Tennessee tobacco market, for more than three days, between the latter part of November and the middle of December and in Europe in the spring, to the extent it does not interfere with school the children are to visit defendant or defendant to visit them in Sanford, whichever plaintiff and defendant may agree to at the time.

(3) During the Christmas vacation period one of the parties shall have the children from the beginning of vacation until December 27 and the other for the balance of the vacation. These periods are to be reversed from year to year so that one party will have the first part of vacation in one year and the latter part of vacation in the following year.

(4) When the children are with defendant, they shall not be in Gloucester, Virginia. Also, when the children are with defendant, they shall not live in Richmond, Virginia, but defendant shall be privileged to bring the children to visit in

Richmond, provided that such visits shall not aggregate in time more than two weeks out of each year.

(5) Plaintiff will provide for the children. When the children are with defendant, plaintiff will make a reasonable allowance to defendant for the maintenance and support of the children, but defendant shall not incur any expenses or bills without plaintiff's prior approval.

(6) When the children are with either party, the other party is to have the right to visit the children at reasonable times.

That thereupon a "dismissed agreed" order was entered by said Court on motion of counsel for both parties on the 18th of November, 1959, that the legal residence of the plaintiff and infant children has continued to be Lee County, North Carolina, and this Court has jurisdiction over the parties hereto and the children which are now the subject of this custody proceeding; that upon this hearing on custody this day and upon inquiry by the Court, both parties by counsel disaffirmed any contention of and did not offer to show any change of circumstances of the parties since their agreement and the entry of the "dismissed agreed" order of the Virginia Court that would justify this Court in making any change in the custody arrangements in said agreement, which terms of agreement meet with the approval of this Court, and this Court finds that such custodial arrangement is in the best interest of said infant children.

Subsequent to the "dismissed agreed" order of the Virginia Court, the defendant moved to the State of South Carolina, and on August 10, 1960, instituted an action in the Juvenile and Domestic Relations Court of Greenville County, South Carolina, seeking the custody of said infant children and obtained service of process on the plaintiff when he was in Greenville to visit his children while they were there pursuant to the Virginia order. Said Juvenile and Domestic

Relations Court issued an order dated December 8, 1960, awarding custody of said children to the defendant. Plaintiff appealed to the Court of Common Pleas of said County, which issued an order dated February 25, 1960, which modified the order of said Juvenile and Domestic Relations Court, by awarding divided custody to the parties. This order, counsel for the defendant at the hearing herein, argued and contended is the law of the case in South Carolina, and is entitled to full faith and credit under the Constitution of the United States. An appeal was duly taken by plaintiff to the Supreme Court of South Carolina, which issued its opinion and judgment dated November 15, 1961, reversing the decree of said Court of Common Pleas, holding that pursuant to the "dismissed agreed" order of the Virginia Court, the agreement reached by the parties prior to the order of the Virginia Court was still of full force and effect. The South Carolina Supreme Court, by order dated December 11, 1961, refused defendant's petition for re-hearing and by order dated December 15, 1961, denied defendant's motion for a stay of Remittitur and thereupon certified down its opinion of reversal. Upon application of the defendant, the Supreme Court of the United States stayed execution and enforcement of the judgment of the Supreme Court of South Carolina and granted certiorari.

UPON CONSIDERATION WHEREOF, NOW THEREFORE, IT IS FURTHER ORDERED, AD JUDGED AND DECREED that the plaintiff is to have the care, custody, tuition and control of H. Aubrey Ford, III, age 9, Barbara Gray Ford, age 7 and James Lowry Ford, age 5, subject to the following:

(1) Defendant is to have the children for the summer period beginning two weeks from the date the last child completes the school year and ending two days before the first child is to return to school in September. Except as set

forth below plaintiff is to have custody for the remainder of the year.

(2) During the time that plaintiff is on the Kentucky-Tennessee tobacco market, for more than three days, between the latter part of November and the middle of December and in Europe in the spring, to the extent it does not interfere with school the children are to visit defendant or defendant to visit them in Sanford, whichever plaintiff and defendant may agree to at the time.

(3) During the Christmas vacation period one of the parties shall have the children from the beginning of vacation until December 27 and the other for the balance of the vacation. These periods are to be reversed from year to year so that one party will have the first part of vacation in one year and the latter part of vacation in the following year.

(4) When the children are with defendant, they shall not be in Gloucester, Virginia. Also, when the children are with defendant, they shall not live in Richmond, Virginia, but defendant shall be privileged to bring the children to visit in Richmond, provided that such visits shall not aggregate in time more than two weeks out of each year.

(5) Plaintiff will provide for the children. When the children are with defendant, plaintiff will make a reasonable allowance to defendant for the maintenance and support of the children, but defendant shall not incur any expenses or bills without plaintiff's prior approval.

(6) When the children are with either party, the other party is to have the right to visit the children at reasonable times.

IT IS FURTHER ORDERED AND ADJUDGED that the defendant, a resident of South Carolina, shall not remove the children from this State before the next Christmas vaca-

tion as provided in Para (3) above.

This 9th day of August, 1962.

s/ EDWARD B. CLARK
Judge Presiding

IN THE SUPERIOR COURT

NORTH CAROLINA
LEE COUNTY

H. AUBREY FORD, JR.,
Plaintiff

VS. NOTICE

BARBARA DALE FORD,
Defendant

TO THE RESPONDENT ABOVE NAMED TAKE NOTICE:

That the Petitioner hereby given notice of appeal to the Supreme Court of North Carolina from the judgment rendered herein by His Honor Edward B. Clark, dated August 9, 1962, exceptions to the said judgment to be hereafter assigned.

This 18th day of August, 1962.

McDERMOTT, CAMERON & HARRINGTON

By s/ GEORGE M. McDERMOTT
Attorneys for Petitioner

SERVICE:

A true copy of the foregoing Notice was on the 18th day of August, 1962, duly served by the undersigned on K. R. Hoyle, a member of the firm of Hoyle & Hoyle, Attorneys of Record for H. Aubrey Ford, Jr., by delivering the same to him in the City of Sanford, North Carolina.

This 18 day of August, 1962.

/s/D. F. HOLDER
Sheriff of Lee County
By /s/J. L. COLEY

IN THE SUPERIOR COURT

NORTH CAROLINA
LEE COUNTY

H. AUBREY FORD, JR.,
Plaintiff

vs.

APPEAL ENTRIES

BARBARA DALE FORD,
Defendant

BARBARA DALE FORD, objects and excepts to the Judgment rendered herein by his Honor Edward B. Clark, Judge Presiding over the August Term of the Lee County Superior Court dated August 9, 1962 and appeals therefrom to the Supreme Court of North Carolina, notice thereof having been duly served on Hoyle & Hoyle, Attorneys of record for H. Aubrey Ford, Jr., on August 18, 1962; appeal bond being hereby fixed in the sum of $100.00 and posted in the form of a cash deposit.

This 20th day of August, 1962.

s/E. M. UNDERWOOD
Clerk of Superior Court of Lee County

NORTH CAROLINA, Lee County

I, E. M. UNDERWOOD, Clerk of Superior Court of Lee County, North Carolina, do hereby certify that the foregoing annexed papers are true and complete copies of the records and Judicial proceeding of a Civil action, lately pending in the Superior Court of Lee County, under the name of "H.

Aubrey Ford, Jr., Plaintiff vs. Barbara Dale Ford, Defendant", which successively bore Summons Docket No. 6159, Civil Issue Docket No. 3262, and now bear Judgment Docket No. 12,409, the same being taken from and compared with the originals on file in this office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and seal of said Court, said Court being a Court of record with a seal, this 28th day of August, 1962.

s/ E. M. UNDERWOOD SEAL
Clerk of Superior Court

NORTH CAROLINA, Lee County

I, CLAWSON L. WILLIAMS, SR., Resident Judge of the Eleventh Judicial District of North Carolina, embracing the County of Lee, do hereby certify that E. M. UNDERWOOD, whose name is subscribed to the foregoing and annexed certificate is Clerk of the Superior Court of Lee County, North Carolina, duly elected and sworn, and that full faith and credit are due to his official acts. I further certify that the seal affixed to said certificate is the seal of said Court and that the exemplification is authenticated in due form and by the proper officer and in his own handwriting, and in such a form and manner that it would be received in any Court of this State.

IN TESTIMONY WHEREOF, I have hereunto set my hand at Sanford, Lee County, North Carolina, this 30th day of August, 1962.

s/ CLAWSON L. WILLIAMS, SR.
Resident Judge
Eleventh Judicial District of North Carolina

NORTH CAROLINA, Lee County

I, E. M. UNDERWOOD, Clerk of the Superior Court of Lee County, North Carolina, do hereby certify that CLAWSON L. WILLIAMS, SR., whose name is subscribed to the foregoing and annexed certificate is the Resident Judge of the Eleventh Judicial District including Lee County, duly elected and sworn, and that the signature of said Judge to the said certificate is genuine.

IN TESTIMONY WHEREOF, I have hereunto set my hand and seal of said Court, in Sanford, Lee County, North Carolina, this the 31st day of August, 1962.

s/E. M. UNDERWOOD (SEAL)
Clerk of Superior Court

In The Supreme Court

NORTH CAROLINA

IN THE MATTER OF H. AUBREY FORD, JR., VS. BARBARA DALE FORD

ORDER

This cause coming on to be heard and being heard before the undersigned Chief Justice of the Supreme Court of North Carolina, and it being made to appear to the undersigned, by petition and affidavit filed herein, that the petition for an order of supersedeas should be granted to the end that the execution and enforcement of the judgment of the Superior Court of Lee County entered in this cause on the 10th day of August, 1962, be stayed pending the appeal from said judgment and further judgment or order of this Court—and it further appearing that H. Aubrey Ford, Jr., should be required to abide by the terms of the Order of the Court of Common Pleas of Greenville County, Greenville, South Carolina, as directed by the December 22, 1961 Order of the Honorable Felix Frankfurter, Associate Justice of the United States Supreme Court, by returning the minor children named in the petition to the petitioner before the opening of the Schools in Greenville, South Carolina, on September 4, 1962.

NOW, THEREFORE, it is ordered that the enforcement and execution of the judgment of the Superior Court of Lee County entered in the cause styled in that Court "H. Aubrey Ford, Jr., Plaintiff, vs. Barbara Dale Ford, Defendant," be and the same is hereby suspended and stayed pending the appeal from said judgment now pending in this Court, and pending judgment or further orders of this Court.

And, it is further ordered that H. Aubrey Ford, Jr., return the minor childen named in the petition to the petitioner not later than 5:00 o'clock P.M., Sunday, the 2nd day of September, 1962.

This the 24th day of August, 1962.

/s/ EMERY B. DENNY
Chief Justice
North Carolina Supreme Court

LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
OCT 15 1962
DAVIS, CLERK

Supreme Court of The United States

OCTOBER TERM, 1962

No. 63

BARBARA D. FORD,

Petitioner

Against

HERMAN A. FORD,

Respondent

REPLY BRIEF OF PETITIONER

W. FRANCIS MARION
and
O. G. CALHOUN
409 E. North Street
Greenville, South Carolina

REX L. CARTER
Lawyers Building
Greenville, South Carolina
Counsel for Petitioner

CHRISTIAN, BARTON, PARKER, EPPS & BRENT
Richmond, Virginia

HAYNSWORTH, PERRY, BRYANT,
MARION & JOHNSTONE
Greenville, South Carolina

Of Counsel

INDEX

Argument

I. The Respondent Has Disregarded The Rules And Orders Of This Court. 2

II. Respondent's Brief Contains Unsupported Statements Of Fact, Erroneous References To The Record, Citations Of Authority Quoted Out of Context, And Burdensome And Irrelevant Matter. 4

III. Writ Of Certiorari Was Properly Issued. 8

Conclusion 9

Appendix

Order Of The Honoiable Felix Frankfurter 11

TABLE OF CITATIONS

Cases:

Andrews v. Geyer 200 Va. 107, 104 S.E. 2d 747 (1958) 6

Campbell v. Campbell 203 Va. 61, 122 S.E. 2d 658 (1961) 6

Semmes v. Semmes 201 Va. 117, 109 S.E. 2d 545 (1959) 6

Statute:

Va. Code § 20-108 (Repl. 1960) 6

Supreme Court of The United States

OCTOBER TERM, 1962

No. 63

BARBARA D. FORD, *Petitioner*,

Against

HERMAN A. FORD, *Respondent*.

REPLY BRIEF OF PETITIONER

The several particulars in which respondent's argument, labeled "STATEMENT OF THE CASE" (pp. 1-9), and brief in general contain distortions of fact as well as burdensome and irrelevant matter are so apparent as to hardly require the filing of a reply brief. However, a reply brief may be necessitated by that portion of respondent's argument based upon matter extraneous to the record, which is appended to his brief without effort to comply with the Rules of this Court; thus brief reference will also be made to some of the most striking inaccuracies, and to respondent's belated further argument that certiorari was improvidently granted.

I

The Respondent Has Disregarded The Rules And Orders Of This Court.

In the "Question Presented" at page 1 of his brief, and repeatedly thereafter the respondent states that the order of the Virginia court was requested by counsel for both parties; and at page 4, footnote 1, it is stated that the joint motion of counsel requesting its entry was erroneously ommitted in printing the Transcript of Record. We note that counsel did not move under Rule 36 (6) of this Court to correct the record, nor do they indicate that the portion of the printed Transcript of Record in which the order is embodied was printed at their direction in preparing the record on appeal to the South Carolina Supreme Court. In any event, however, the petitioner has never contended that the order of dismissal was not entered by consent of both attorneys, and this point upon which counsel for the respondent lay such great stress is completely without significance.

In their "STATEMENT OF THE CASE" at pages 7-9, and "ARGUMENT" at pages 13, 14, and 25 counsel for respondent refer to a proceeding which respondent initiated in North Carolina, and appended to their brief at pages 27-76 is a purported record of the proceedings therein. Here again counsel have argued and appended the matter wholly outside the record, and even if it could have been properly added under Rule 26 (5) or any other Rule of this Court, which is doubtful, the respondent made no effort to do so. Of greater importance, however, is that counsel for the respondent have invited attention to the fact that they have urged and succeeded in obtaining the issuance of a custody decree after this Court had acquired jurisdiction of the persons and of the subject matter by the order of Mr. Justice Frankfurter, filed December 22, 1961 and set forth in the appendix hereto, and the order of this Court allowing certiorari, filed February 26, 1962. As indicated at pages 27-34 in the appendix to his brief, Herman Ford instituted an action for divorce and for

custody of the children, in the Superior Court for Lee County, North Carolina, by service of summons on December 21, 1960, thirteen days after the issuance of the order of the Juvenile and Domestic Relations Court of Greenville County, South Carolina granting custody to Barbara Ford. By her attorneys Barbara Ford appeared specially for the purpose of making a motion to dismiss the action insofar as it related to custody (Resp's. Br. 34, 35), but the Judge of the Superior Court ruled that the motion was properly a matter for determination on the trial of the action (Resp's. Br. 36). Herman Ford thereafter amended his complaint by adding a second cause for divorce upon the ground of two years separation (Resp's. Br. 60, 61), to which Barbara Ford, by her answer to the amended complaint, agreed (Resp's. Br. 62, 63); but as the respondent did not withdraw his first alleged cause or ground, *i.e.* adultery, it was necessary that the divorce action be set for jury trial as a contested case. The action for divorce came on for trial on August 6, 1962, and the divorce was granted upon the second ground (two years separation) only. The trial judge then set the hearing on respondent's motion for custody immediately upon the conclusion of the jury trials, despite the prior order of Mr. Justice Frankfurter and order of this Court granting certiorari.

The respondent neglected to append to his brief the transcript of the proceedings at this hearing, and the order of the Judge of the Superior Court does not recite that counsel for Barbara Ford renewed their motion to dismiss, offering in support thereof the aforementioned orders of this Court. The motion was denied and the Judge of Superior Court awarded custody to Herman Ford. The enforcement of the judgment was suspended, however, by summary order of the Chief Justice of the Supreme Court of North Carolina, requiring Herman Ford to "abide by the terms of the Order of the Court of Common Pleas of Greenville County, Greenville, South Carolina as directed by the December 22, 1961 Order of the Honorable Felix Frankfurter, ***" (Resp's. Br. 75); thus the necessity of application to this Court for an injunc-

tion in protection of jurisdiction, or other appropriate remedy, was obviated.

II

Respondent's Brief Contains Unsupported Statements Of Fact, Erroneous References To The Record, Citations Of Authority Quoted Out Of Context, And Burdensome And Irrelevant Matter.

In respondent's "STATEMENT OF THE CASE" it is stated:

> "From the conversation Respondent correctly inferred that Petitioner had returned to North Carolina to get the three children. (R. 73-74) Being apprehensive, Respondent then arranged by telephone for the children to be moved to Fayetteville, North Carolina in the company of the parties' German maid, where they were promptly joined by Respondent and his mother. (R. 156, 163) However, Petitioner, accompanied by her sister, discovered the whereabouts of the children in Fayetteville, and the next morning—immediately after Respondent had left for his office in Sanford—took the children and drove off with them to Richmond over the protestations of Respondent's mother. (R. 17, 73-74, 96, 163)"

As appears from the record the respondent should have "correctly inferred" that Barbara Ford was returning to North Carolina when she asked him if he would drive her and upon his refusal told him that she would take the train (R. 73). The respondent must already have been "apprehensive" as he had, by his own testimony, secretly called and had the children taken from their home as soon as he arrived in Richmond (R. 155). The last sentence of the above quotation from the respondent's brief is not supported by the evidence as the only place in the record where this appears is at R. 17, where the unsubstantiated allegations of respondent's petition for writ of habeas corpus are set forth.

Curiously, after stating that the petitioner took the chil-

dren and drove off to Richmond over the protestations of respondent's mother, respondent states at page 13 of his brief that the petitioner "clandestinely" removed the children, not adding, of course, that he, himself, had first sent the children from their home to an unnamed friend's house and thence to the motel in Fayetteville without advising the petitioner or her confidants (R. 155). This would indicate that the respondent may have a misconception of the definition of the word "clandestine", or at least as to whose actions the word should apply.

Similarly, at page 16 of his brief, the respondent indicates a misconception of the import of the word, "reported". The Judge of the Juvenile and Domestic Relations Court made the express finding, based upon the admission of counsel for the respondent, that the custody agreement of the parties "was never shown to that (Virginia) Court" (R. 25); and counsel for respondent, although by implication denying this fact in the text of their brief (Resp's. Br. 15), admit in footnote 14 at page 15 that the agreement "was not, in fact, revealed to the Virginia court ***". Counsel state, however, that "reported" and "revealed" are not synonymous (Resp's. Br. 16), and that:

> "*** upon representation of this agreement and upon motion of *both parties*, the case was dismissed by the Virginia Court."

According to *Websters New International Dictionary*, Second Edition, the word "reveal" is synonymous with the words "disclose" and "divulge"; the word "report" is synonymous with the words "narration" and "recital"; and the word "representation" is synonymous with the words "show" and "depiction". We, therefore, agree with counsel for respondent that "reported" and "revealed" are not synonymous, but challenge them to substantiate their above quoted assertion that "upon representation" of the agreement and motion the case was dismissed, or to explain how the agreement could have been represented, *i.e.*, shown or depicted, to the Virginia court when the South Carolina Judge made the finding, to which

counsel did not except, that it was not shown to the Virginia court and when, by the footnote admission in their brief, it was not revealed, *i.e.*, disclosed or divulged, to the Virginia court.

At page 19 the respondent cites and quotes (with usual added emphasis) the Virginia court in *Campbell v. Campbell* 203 Va. 61, 64, 122 S.E. 2d 658, 661 (1961), as authority for his contention that a prior custody decree "can be altered only where *subsequent* facts would so dictate." In that case the Virginia court, after referring to section 20-108, Code of 1950, 1960 Replacement Volume, said:

> "* * * and if in the future conditions materially change effecting the welfare of the children the court has the authority to change or modify the decree at any time to meet the changed conditions."

By the express language of the section to which the court referred[1], the court has unlimited power to modify its decrees "as the circumstances of the parents and the benefit of the children may require". As stated by the court in *Campbell v. Campbell, supra*, if the future conditions materially change affecting the welfare of the children the court could modify its decree to meet the changed condition; but it would be incredible if the court could not also modify its "decree" upon subsequently being apprised of the contents of the private agreement of the parties and, after full hearings, determining that its former "decree" was not in the best welfare of the children.

The cases of *Semmes v. Semmes* 201 Va. 117, 109 S.E. 2d 545 (1959) and *Andrews v. Geyer* 200 Va 107, 104 S.E. 2d 747 (1958), cited and discussed at pages 19-21 of respondent's brief, are both clearly distinguishable from the

---

[1] Section 20-108, Code of 1950, 1960 Replacement Volume:

"The court may, from time to time after decreeing as provided in the preceding section, on petition of either of the parents, or on its own motion or upon petition of any probation officer or superintendent of public welfare, which petition shall set forth the reasons for the relief sought, revise and alter such decree concerning the care, custody, and maintenance of the children and make a new decree concerning the same, as the circumstances of the parents and the benefit of the children may require."

present case as the custody agreement in the former was expressly ratified in the decree, and the agreement was actually embodied into the decree in the latter. Even so, however, in *Semmes v. Semmes, supra*, the Virginia court did modify its former decree, in which the custody agreement had been expressly ratified, without proof of a change of condition. Full testimony was taken at the proceeding from which the modifying decree resulted; and when Mrs. Semmes (Ault) thereafter brought yet another motion to modify the decree, the Judge then held that she had not borne the burden of showing that the welfare of the child required that a change be made. On appeal, the Virginia Supreme Court of Appeals stated that the paramount issue was whether the evidence showed that the interest of the child would be best served by modification of the custody provisions in the second decree because of change of conditions and circumstances since its entry, and not because of a change in conditions since the entry of the first decree in which the custody agreement was ratified.

In *Andrews v. Geyer supra*, the custody agreement of the parties had been embodied into the original decree, and at a subsequent hearing it was found that the original decree had "worked satisfactorily" until the subsequent proceeding was instituted. There again the lower court modified the original decree by granting full custody to the respondent without proof of change of condition; and although the original decree was reinstated on appeal, the reversal was predicated upon the fact that the original decree had worked satisfactorily, and not upon a failure to prove change of condition.

In their brief, counsel for respondent repeatedly refer to the allegations and evidence of adultery on the part of the petitioner, from which it would appear that they have despaired of meeting the issue, *i.e.* whether the proceeding in the Virginia Court constituted a true adjudication on the merits. It would appear that by constantly emphasizing this matter, which is wholly irrelevant to the question involved,

counsel hope to influence the consideration of the case. Aside from the fact that such matter is wholly irrelevant and is included in disregard of Rule 40 (h) 5 of this Court, the matter has twice been fully considered and weighed along with the other evidence from which a determination of the best interest of the children could be made, and on both occasions it was concluded that the young children should spend most of the year with their mother. As pointed out in petitioners brief in main, the Judge of the Juvenile and Domestic Relations Court has exclusive jurisdiction in custody matters, and necessarily by his specialized experience becomes an expert in the field. In light of this experience and after having heard testimony for several days, having had the opportunity to observe the witnesses, and having heard the full arguments of counsel, he was in the best position to make a determination of that which was in the best interest of the children; and he determined that custody should be with their mother.

By the same token, upon appeal to the Court of Common Pleas, Judge Grimball, with all the evidence before him, affirmed the decree of the trial judge in every respect except that he gave Herman Ford custody during the summer months rather than leaving it to the parties to "work out a provision for the defendant to have the children during a portion of their summer vacation ***" (R. 27, 187-188). These two orders are the only orders that have resulted from a determination of what was in the best interest of the children based upon all the evidence; and these are the orders in the face of which respondent asserts that the result of the respondent being awarded custody "probably would be reached under a proper application of South Carolina Law to the facts of this case." (Resp's. Br. 25)

III

Writ Of Certiorari Was Properly Issued.

In their brief counsel for the respondent deny that the question involved is that presented in the petition for writ of certiorari and the petitioner's brief, and, in effect, repudi-

ate their own brief in opposition to petition for certiorari wherein they too stated the question to be whether the "dismissed agreed" order of the Virginia court was entitled to full faith and credit in South Carolina. In the decision of the South Carolina Supreme Court, which counsel for the respondent now say does not raise a substantial federal question, it is expressly stated (R. 205):

> "If the respondent here had instituted in the Courts of Virginia the action commenced by her in the Courts of this State, the appellant could have successfully interposed a plea of *res judicata* as a defense to said action. Since the judgment entered in the Virginia Court by agreement or consent is *res judicata* in that State, it is *res judicata* and entitled to full faith and credit in this State. We are required under Art. IV, Sec. 1 of the Constitution of the United States to give the same faith and credit in this State to the 'dismissed agreed' order or judgment as 'by law or usage' the Courts of Virginia would give to such order or judgment."

Counsel for the respondent attempt to strengthen their argument that "The South Carolina court's consideration of the Virginia order—and the effect given it—constituted no more than an intermediate determination which was preliminary to the application of South Carolina law" (Resp's. Br. 23), by generous use of italics in quoting from the decision of the South Carolina Supreme Court. The quotation at page 24 of respondent's brief, which is contended to be the court's "application of South Carolina law", is obviously obiter dictum, however, and could not affect or have any bearing upon the federal question decided by the South Carolina court. We, therefore, submit that the argument contained in respondent's point *D* is factitious and requires no further comment or reply.

CONCLUSION

The petitioner earnestly submits that:

(a) The argument should be confined to the record;

(b) The judgment of the South Carolina Supreme Court

should be reversed for the reasons set forth in petitioner's main brief; and,

(c) Any further proceeding in the cause entitled *H. Aubry Ford v. Barbara Dale Ford*, now pending in the Supreme Court of North Carolina, not in conformity with the mandate of this Court should be enjoined.

Respectfully submitted,
W. FRANCIS MARION
and
O. G. CALHOUN
409 E. North Street
Greenville, South Carolina

REX L. CARTER
Lawyers Building
Greenville, South Carolina
Counsel for Petitioner

CHRISTIAN, BARTON, PARKER,
EPPS & BRENT
Richmond, Virginia

HAYNSWORTH, PERRY, BRYANT,
MARION & JOHNSTONE
Greenville, South Carolina
Of Counsel

APPENDIX

Supreme Court of the United States

No. —— ,— October Term, 1961.

BARBARA D. FORD, Petitioner,

vs.

HERMAN A. FORD

ORDER

Upon Consideration of the application of counsel for the petitioner, and of the opposition thereto,

It Is Ordered that the execution and enforcement of the judgment of the Supreme Court of South Carolina be, and the same is hereby, stayed to and including January 15, 1962. In the event a petition for writ of certiorari is filed in this Court on or before January 15, 1962, this stay is to continue pending the action of the Court on such petition. Should the petition be granted, this stay is to continue pending the issuance of the mandate of this Court. In the event the petition for certiorari is not filed on or before January 15, 1962, or in the event the petition for certiorari is denied, this stay order shall expire automatically.

(S) FELIX FRANKFURTER
Associate Justice of the Supreme Court of the United States

Dated this 22nd
day of December, 1961.